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MORRISON'S TRANSCRIPT

—OF THE—

DECISIONS

—OF THE—

SUPREME COURT OF THE UNITED STATES.

EDITED BY
ROBERT M. HUGHES, M. A.,
of the Norfolk (Virginia) Bar.

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MORRISON'S TRANSCRIPT.

DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

THE CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY AND JAMES W. ELWELL v. WILLIAM R. FOSDICK AND JAMES D. FISH; AND THE CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, JAMES W. ELWELL, AND R. BIDDLE ROBERTS v. WILLIAM R. FOSDICK, JAMES D. FISH, FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON, AND JOHN M. DENISON.

March 6, 1882.

1. In a railroad mortgage which is declared to be for the purpose of securing the payment of the interest as well as the principal of certain bonds, and where the mortagor's right of possession terminates upon a default in payment of the interest as well as principal on any of the bonds, the trustees in the mortgage or any bondholder, on non-payment of any interest, may file a bill for foreclosure and sale, and will be entitled to a decree *nisi*, ascertaining the amount of interest due, and giving the debtor a reasonable time to pay it. In case of non-payment, a sale may be made and the proceeds applied to the payment of interest and also of principal; but the debtor, at any time before the sale or its confirmation, may redeem by bringing into court the amount of unpaid interest and costs.
2. The decree on which the sale is based must find correctly the fact, nature, and extent of the default which constitutes the breach of the condition of the mortgage, and the amount due on account thereof; and a decree which orders a sale for the non-payment of a larger amount than is actually due is fatally erroneous.
3. Where the foundation of the trustees' right to foreclose was, that a certain amount of interest should be in default, and it was shown that such default had occurred, but there was nothing in the record to show that the coupons as to which default had been made had not

been funded under certain funding agreements granting an extension, and the default so waived, and it was not even shown that the coupons held by some of the complainants had not been funded—this was not sufficient to justify a foreclosure based on such default as a necessary condition precedent.

4. Nor is such foreclosure justified by the fact that the company, after loss of possession of its property by the foreclosure proceedings, failed to pay interest; for the steps taken as a necessary preliminary to foreclosure must stand or fall upon the circumstances existing when they were taken, and cannot be supported or validated by subsequent occurrences.
5. A mere provision that in case of a sale for default of interest the proceeds are to be applied to the payment of principal also, does not make the principal due before the stipulated time, nor prevent the mortgagor from redeeming by the mere payment of interest.
6. Provisions imposing penalties being strictly construed, in a paragraph of a mortgage which provides that "if default be made in the payment of any half-year's interest on any of the bonds secured, and such default continue for more than six months after demand without the consent of the holder, then the principal of all the bonds shall immediately become due, and the trustees may so declare the same and notify the debtor; and, upon the written request of the holders of a majority of the said bonds, shall proceed to collect both principal and interest,"—the latter clause *held* to render such written request a necessary condition precedent to foreclosure proceedings, and not merely to render imperative on the trustees a power claimed to have been made optional with them by the first clause.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

E. Walker and *R. Biddle Roberts*, for appellants.

James D. Campbell, for appellees.

MATTHEWS, J.—These appeals bring into review decrees in the same suit. The bill was filed by Fosdick and Fish, as mortgagees in trust for holders of bonds, for the foreclosure of a mortgage given by the Chicago, Danville and Vincennes Railroad Company upon its railroad, and a sale of the mortgaged premises. A decree in accordance with the prayer of the bill was rendered, and under it a sale was had and confirmed by the court. From these decrees respectively the present appeals are prosecuted.

Opinion of the court.

The bonds secured by the mortgage in question were dated March 10, 1869, amounted to $2,500,000 in all, and were made payable on April 1, 1909, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of April and October of each year, on the delivery of annexed interest warrants in the city of New York, at such place as might be designated by the railroad company by advertisement published in said city.

The mortgage bears even date with the bonds, and after reciting the resolutions of the board of directors authorizing the issue of the bonds and the execution of the mortgage, conveys to Fosdick and Fish, as trustees, and to their successors and assigns, the railroad of the company, extending from its terminus in Chicago southerly through certain named counties to Danville, and thence southeasterly to a point on the State line of Indiana, connecting at that point with the Evansville, Terre Haute and Chicago Railroad, being in length about one hundred and fifty miles, "including all the property between said terminal points which said party of the first part now has and possesses, or may hereafter acquire," &c.

The conditions and trusts upon which the conveyance is made are expressed in a series of articles, nine in number, of which it is important to notice only the following:

The fifth article provides in substance that in case default shall be made in the payment of any interest, or of the principal of any of said bonds, without the consent of the holder, the railroad company shall, within six months thereafter, the same default still continuing, on demand of the trustees surrender to them possession of the road and mortgaged property; the trustees operating the same shall apply the net profits and income to the payment of the interest so in default until such default shall have been satisfied, when the mortgaged premises shall be surrendered to the mortgagor; but it is provided that no such demand for possession shall be made by the trustees until they shall have been required to take such possession by

the holders of at least one-half of all of the said issue of bonds then unpaid and outstanding.

The sixth article provides further, that in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the trustees, after entry into possession, taken as above authorized, or other entry, or without entry, to sell and dispose of to the highest bidder the mortgaged premises as an entirety, at public auction, in Chicago, at such time as they may appoint, first having demanded of the mortgagor payment of all money then in default, and having given sixty days' notice of the time and place of sale, by advertisement, as specified; and to convey the same when sold to the purchaser, on payment of the purchase-money, in fee-simple, which conveyance, it is declared, shall be a perpetual bar in law and equity against the title of the mortgagor, or any other person claiming under it. The net proceeds of such sale are to be applied by the trustees to the payment of the interest on the bonds then outstanding, *pro rata*, until all such interest shall be paid, and afterwards to the payment of the principal, and any surplus to the mortgagor; the payments to be made on the bonds whether the same shall then have become due or not.

By the seventh article it is provided that at any sale of the mortgaged premises, made under the power contained in the deed, or by judicial authority, the trustees may become purchasers of the same in behalf of the bondholders, at a price, in case the sale is of the whole property as an entirety, not exceeding the whole amount of said bonds and interest then outstanding.

The eighth article is as follows:

"8th. If default be made by the party of the first part in the payment of any half-year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented and its payment demanded, and such default shall have continued six months after such demand without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall

be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof; and upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as herein provided."

It is averred in the amended bill of Fosdick and Fish that all the bonds described in the mortgage had been issued and were outstanding.

It is also alleged that on March 4, 1872, the Chicago, Danville and Vincennes Railroad Company became consolidated into one corporation, by the same name, with the Rossville and Indiana Railroad Company; and on March 9, 1872, a further consolidation was effected, by the same name, with the Western Railroad Company, an Indiana corporation, whereby the consolidated company was empowered to build and operate a railroad from the State line in Warren county to Brazil, in Indiana; and that on March 12, 1872, the consolidated company, to raise means wherewith to construct its Indiana division, issued its bonds to the amount of $1,000,500, bearing interest at the rate of seven per cent. per annum, and payable forty years after date; to secure which, on the same day, it executed a mortgage to Fosdick and Fish, the complainants, covering its Indiana division, and a branch road extending from a point three miles south from Covington to the village of Newburg, being about 80 miles in all. All the bonds secured by this mortgage were issued.

It is further alleged that, as further security for both these issues of bonds, the railroad company, on April 24, 1872, executed another mortgage to the complainants, conveying the Indiana division as security for the first issue of bonds on the Illinois division, and conveying the Illinois division as security for the bonds issued originally on the Indiana division. The railroad company made a subsequent consolidation on May 6,

1872, under the same name, with the Attica and Terre Haute Railroad Company.

The road as built in Illinois extends from Dalton, about twenty miles south of Chicago, to Danville, about 108 miles, with a branch from Bismark in Vermillion county to the east line of the State of Illinois, about seven miles. It obtains an entrance into Chicago over the roads of other companies. The company has constructed in Indiana its line from a point where the Bismark branch intersects the State line, a distance of eighteen miles, and has done a large proportion of the work required to carry its road to Brazil.

It is further alleged that the railroad company paid all coupons on both classes of bonds maturing on and prior to April 1, 1873, but that "none of the coupons maturing since that time, or any part thereof, have ever been paid, but the said company, though often requested, has never paid the same, but so to do has made default."

Shortly after the first default on October 1, 1873, to wit, on November 11, 1873, the railroad company issued a circular to the holders of its bonds proposing to fund the coupons maturing from October 1, 1873, to April 1, 1875, in convertible seven per cent. bonds to be issued for that purpose, the coupons to be deposited with Fosdick, one of the complainants, as a trustee, to be held by him until October 1, 1876, when they were to be cancelled; but in case of non-payment of any coupons becoming due up to October 1, 1876, the coupons deposited with the trustee were to be returned to the original owners, and the second mortgage or convertible bonds surrendered to the company.

In response to this proposition coupons to a considerable amount were deposited with the trustee and convertible bonds received in exchange.

Soon after, on November 20, 1873, another proposition was submitted to the bondholders to exchange these four coupons for certificates of indebtedness payable in five years from February 1, 1874, with interest payable semi-annually, the coupons

to be held by the trustee until after that date, when they were to be cancelled; but in case of non-payment of the interest or principal of the certificates, or of the coupons on the first-mortgage bonds, between October 1, 1875, and February 1, 1879, both inclusive, then the coupons were to be returned by the trustee to their owners, upon surrender of their certificates, with their original rights unimpaired.

It is alleged in the bill that the holders of $2,801,000 of both classes of bonds accepted one or the other of these propositions and deposited their coupons accordingly.

To secure the convertible bonds referred to in the first proposition, a mortgage was executed by the company, of which James W. Elwell was trustee, to the amount of $1,000,000, payable, with interest semi-annually at the rate of seven per cent. per annum, on February 1, 1893, covering the entire line and both divisions of the railroad. It is alleged in the bill that all these bonds, except about $45,000, have been issued.

It is charged in the bill that the railroad company failed to pay all the coupons upon the certificates of indebtedness due February 22, 1875, and that it has not paid any that fell due August 1, 1875. It is also charged that the company has never paid any of the coupons upon any of the $4,000,000 of bonds which were not funded, and which matured subsequent to October 1, 1873, amounting to $1,199,000, and that the coupons thereon are overdue and remain unpaid, the owners thereof never having consented to such default; and it is alleged that the company is wholly insolvent.

It is further shown in the bill that on June 12, 1875, the railroad company made a further issue of bonds to the amount of $1,000,000, due January 12, 1877, and to secure the same executed a chattel mortgage to R. Riddle Roberts upon its rolling stock, engines, cars, tools, and equipment, but it is charged that the same was not executed, acknowledged, and recorded as required by law, and is, therefore, null and void; but that, if valid, it is subject to each of three mortgages of prior date. About $936,000 of these bonds, it is averred, are

held as collateral to debts due by the company, the remainder not having been issued.

It is claimed in the bill, also, that by reason of its insolvency the railroad company will not be able to pay the certificates of indebtedness issued by it, or the interest thereon, and that in consequence of its failure to pay the interest thereon already accrued, the owners of the unpaid coupons of the four millions of bonds are entitled to rescind the funding arrangement and to demand and enforce payment of the coupons funded as aforesaid.

It is further alleged that "by reason of the default of said company in the payment of the coupons due October 1, 1873, and subsequent thereto, which have never been funded, the principal of all of the said bonds has, by the terms and conditions of the mortgage securing the same, become due and payable; and all of the said Illinois division bonds of the said Indiana division bonds were, by the terms and conditions of the mortgage securing the same, and in consequence of the defaults aforesaid, due and payable prior to the commencement of this suit. Your orators further allege that of the said Illinois division bonds $698,000 thereof have never been funded by the holders thereof, and the holders thereof have never in any way consented to the continuance of the default in the payment of interest thereon. Your orators allege that they have been requested by the holders of a majority of said Illinois division, and also by the holders of a large number of the said Indiana bonds, to proceed to collect the principal and interest of said bonds by foreclosure and sale of all of the railroad, franchises, property, and appurtenances of said company within the State of Illinois."

It is also alleged that the Indiana division of the road is wholly insufficient to secure the payment of the Indiana division bonds, and that while the Illinois division is more than sufficient to secure the payment of the Illinois division bonds in full, it is not sufficient in addition to pay in full the whole of the Indiana division bonds.

Opinion of the court.

The original bill was filed February 27, 1875, and made no party defendant except the railroad company. It contained the following averments, which are not found in the amended bill:

"Your orators further show to your honors that they have been required by the holders of more than one-half of the twenty-five hundred bonds to demand possession of the said railroad property, franchises, and appurtenances of and from the said railroad company, and have made such demand in pursuance of said requirement, but that said railroad company has not delivered the possession thereof to your orators, but so to do have wholly neglected and refused.

"Your orators further show unto your honors that they are informed and believe, and therefore charge the fact to be, that at least ninety per cent. of the said coupons which matured upon said bonds on the 1st day of October, 1873, have been duly presented for payment to the said railroad company, and payment thereof demanded from said company, and that the same have never been paid, nor any part thereof; and that the holders of six hundred and ninety-eight of said bonds have never in any way consented to the continuance of said default; and that in consequence of the continuance of said default, without the consent of said holders of said six hundred and ninety-eight bonds, the principal and interest of all of the said bonds have become due and payable, and that your orators, as trustees as aforesaid, under and by virtue of the provisions of said mortgage and the authority therein conferred upon them, have declared the principal of all of said bonds to be due and payable, and have notified the said railroad company thereof."

On May 17, 1875, James W. Elwell, acting trustee in the mortgage of December 16, 1872, appeared and filed a cross-bill, setting out the terms of the mortgage, the issue of the bonds secured thereby, and alleging that while the interest upon about $160,000 of the bonds had been paid by the company, that upon the remainder was wholly unpaid. The cross-

bill proceeds to set out the particulars of the agreements alleged to have been entered into between the railroad company and the holders of its first-mortgage bonds, and continues with the following averments:

"And your orator therefore avers that said corporation is not in default in the payment of interest upon its said first-mortgage bonds to the amount of one million eight hundred and two thousand dollars, but, on the contrary, your orator avers that said company has adjusted and settled with the holders of said bonds to the amount as above stated, and received an extension of payment of all such interest coupons now past due and that will mature prior to the first day of October, 1875.

"Your orator states that said corporation has paid to the holders of said certificates of indebtedness all interest coupons attached to said certificates as the same matured, and in accordance with the terms thereof, which had been presented before the appointment of the receiver, as hereinafter stated.

"And your orator represents, upon information and belief, that the holders of the balance of said issue of twenty-five hundred bonds have acquiesced in said extension of payment of interest and excused such default, and have not demanded the payment of their interest coupons nor attempted to enforce the collection of the same.

"And your orator further states that notwithstanding said agreement of the holders of said first-mortgage bonds to extend the payment of said interest warrants as hereinbefore stated, and the payment of the interest at maturity by said company upon said certificates of indebtedness, yet your orator is informed and believes, and so charges the fact to be, that by reason of divers persons claiming and pretending to be in the interest of a part of said first-mortgage bondholders combining and confederating to wrong and injure your orator and the holders of said second or convertible mortgage bonds and other creditors of said corporation, said company was, by the action of the Circuit Court of Will county, in said State of Illi-

nois, on 22d day of February last past, wrongfully and unlawfully dispossessed of all its property so conveyed to your orator by said deed of trust; that all of said property, together with the rights, privileges, and franchises of said company, were, on said 22d day of February, wrongfully and fraudulently taken from the custody and control of said company, and without the knowledge or consent of said corporation, your orator, or of the defendants herein, placed in the charge and under the custody of strangers to said company, and to each of said deeds of trust; that said parties still wrongfully retain the possession of said property and control the revenue and income thereof, thereby preventing said company and your orator from providing funds for the payment of the interest warrants to mature upon the bonds secured by said trust deed so made to your orator, thereby endangering such property and materially depreciating the value of such securities.

"Your orator further states that he is advised and believes, and charges the fact to be, that the property conveyed to the defendants, Fosdick and Fish, by the trust deed so made to them greatly exceeds in value the amount of bonds so issued under their said deed of trust; and that the net income or revenue derived from a proper and economical use of said property is and will continue to be more than sufficient to pay all of the interest warrants as they may become due and payable on all the bonds issued under the said deed of trust.

"And your orator further states, upon information and belief, that certain holders of bonds issued under the deed of trust so made to the defendants, Fosdick and Fish, trustees as aforesaid, whose names your orator will furnish if required by this honorable court, have resolved and determined to demand and require of them that they shall without delay declare the principal of all of their said bonds presently due and payable, and that they shall prosecute said action to a speedy decree of foreclosure of said trust mortgage, and shall enforce sale of all the property and franchises of said railroad company un-

der said decree, thereby rendering the security of the bonds issued under the deed to your orator utterly valueless.

"And your orator avers that such action will be grossly unjust and inequitable towards the *cestui que trusts* of your orator and other creditors of said company, especially as about eighty per cent. of all of said bondholders have extended the payment of their said interest warrants as hereinbefore stated, and waived and excused the default of said company in the payment of said interest.

"And your orator further represents, upon information and belief, that none of the holders of the bonds issued under the said trust deed executed to the defendants, except a very inconsiderable number thereof, have presented to and demanded of said railroad company payment of any of the past-due interest warrants or coupons of said bonds, as required by the eighth article or condition of said trust deed, and therefore your orator says that the said trustees, Fosdick and Fish, have no authority under said trust deed to proceed to collect the principal of said bonds by foreclosure and sale, or otherwise."

The amended bill of Fosdick and Fish, of which an abstract has already been given, was filed September 14, 1875. Its prayer for relief is that the said Chicago, Danville and Vincennes Railroad Company, and the said James W. Elwell, whose appearance has already been entered in this cause as parties defendant thereto, may be required to answer this your orators' amended bill, but without oath, which is hereby expressly waived, and that the said R. Biddle Roberts may be made party defendant hereto, and summoned to answer this your orators' bill, but without oath, which is hereby expressly waived; and that the receiver heretofore appointed upon the prayer of the original bill in this cause may still hold the said railroad, its equipment and appurtenances, and operate the same under the order and direction of this honorable court; and that an account be taken of the amount due by the said railroad company upon the said Illinois division bonds, and upon the said Indiana division bonds separately, and that the

said railroad company be ordered to pay the amount so found due upon said bonds, severally, within a short time, to be limited by this honorable court, and that upon default thereof the said Illinois division of the said railroad, together with all of the franchises, equipment, and appurtenances thereof, may be sold by the master in chancery of this court for the payment, first, of the said twenty-five hundred (2,500) Illinois division bonds, and secondly, of the fifteen hundred (1,500) Indiana division bonds, which are the first and second liens upon the said Illinois division of said railroad, its equipments, franchise, and property, as hereinbefore set forth, or for such other and further relief as to your honors shall seem meet and to equity shall appertain.

On October 23, 1875, the Chicago, Danville and Vincennes Railroad Company filed a demurrer to so much of the amended bill of Fosdick and Fish as charges that it will be impossible for said company to fulfill the conditions of the funding agreements, and that the holders of said certificates have the right to rescind said agreements; and to so much of said amended bill as charges that the principal of said bonds has become due and payable.

On the same day it also filed an answer containing, among others, the following averments:

"Said respondent says that on the 22d day of February, A. D. 1875, one Stephen Osgood, without any notice whatever to this respondent, upon his *ex parte* application to the judge of the Circuit Court of Will county, in the said State of Illinois, wrongfully and fraudulently procured the appointment of receivers of all the property, assets, and income of the said respondent within the State of Illinois, and that such receivers forcibly took possession of the offices and all the property of said respondent on said 22d day of February, and by the aid of writs of assistance and other process issued by said court, or the judge thereof, held the possession of all said property of this respondent, its earnings and income, until the first day of June, 1875, at which time said receivers were removed by the

order of this honorable court, and a receiver of all such property appointed under the prayer of the complainants in the said original bill of complaint contained.

"And this respondent says that on said 22d day of February it was not in default in the payment of any of said certificate warrants that matured February 1, 1875; that all of said warrants were paid as presented to this respondent prior to said 22d day of February, and that such balance of $3,167.77 was not paid for the reason that the action of said State court had deprived this respondent of the power to meet such payments. But the said respondent denies that the said corporation was, on said first day of February, 1875, insolvent and unable to meet the payment of said certificate warrants, as charged in said amended bill of complaint, but, on the contrary, avers and charges that at all times after the maturity of said interest, and until said 22d day of February, said respondent had the pecuniary ability and was ready and willing to pay all such interest, and did in fact pay all such interest warrants when presented.

"And the said respondent further says, and charges the fact to be, that the net earnings of said company during the year 1874, and the months of January, February, April, and May of the present year, were more than sufficient to pay all the interest accruing upon the bonds issued under the trust deed to the complainants, and also the interest upon said certificates of indebtedness, and upon all other mortgage bonds that had been negotiated and sold by said respondent.

"And the said respondent says that the said company is not in default in the payment of any certificate interest coupons after proper demand, and that therefore none of the holders of said certificates are lawfully entitled to the return from the said Fosdick, special trustee as aforesaid, of the bond interest warrants so funded and deposited with the said Fosdick.

"Your respondent admits that the contracts for funding said interest warrants are substantially set forth in said complainant's amended bill, and that the holders of about four-fifths of

the said four thousand first-mortgage bonds then, and about three-fourths of all now, outstanding entered into said agreement, and so funded their said interest warrants.

* * * * * * *

"Your respondent, further answering, says that it has no knowledge, information, or belief of the number of said bondholders, under said deeds of trust, that have made demand upon said complainants that they should execute their said trust; but respondent says that said company is not, and was not at the commencement of this action, in default to one-half of such interest, and therefore respondent says that said bondholders had no right to make such demand, and neither were the complainants nor respondent required to accede to such demands by the terms of said trust deed.

"And the said respondent, further answering, says that it has no means of knowledge of the per cent. of the holders of said interest warrants that matured October 1, 1873, that presented such warrants to the company and demanded payment thereof; but respondent says if it is true, as charged, that at least ninety per cent. made such demand, at least eighty per cent. of the entire number afterwards waived such payment and consented to an extension thereof, as hereinbefore stated, and that as to such eighty per cent. said company is in no default whatever.

"And as to the holders of said six hundred and ninety-eight of said bonds who did not fund their interest, the said respondent says, upon information and belief, and so charges, that a large majority thereof have consented to such default in the payment of said interest and have assented to such extension; that many of the holders of such bonds have expressed to the officers of said company their assent to such extension, and promised and agreed (but not in writing) that they would in no manner interfere with or by their adverse action defeat the plans of said company for the extension of payment of said interest.

"And respondent further says that it has no knowledge that any holder of said bonds ever elected to declare the principal due on account of a default of said company, with the excep-

tion of the said Osgood, who only claimed to hold nine of said bonds. And as to the said Osgood, the respondent says that, to the best of its knowledge and belief, the said Osgood never has, nor has any one at his request, ever demanded of said company, or of any of its officers or agents, payment of any of the coupons attached to any of the nine bonds of which he claims to be the owner, and that the only notice the respondent has ever had that the said Osgood had so elected, or that he demanded payment of either principal or interest, was derived from his said bill of complaint filed in said Circuit Court of Will county, as aforesaid, on said 22d day of February. And the said respondent further avers that on the 23d day of February, 1875, the said defendant offered and tendered the attorney of record of said Osgood, in open court, in said county of Will, full payment, principal and interest, of all the bonds held by the said Osgood, which was refused by said attorney. And that respondent at the same time offered to deposit in court the full amount of said principal and interest, upon condition that said receivers should be discharged and said property restored to said respondent, which offer was refused."

On January 6, 1876, a petition was filed by Stephen Osgood, who had commenced the original proceeding in the State court on February 22, 1875, and seven others, claiming to be holders of bonds and coupons secured by the mortgages to Fosdick and Fish, in which they recite the previous proceedings in respect to the bill filed by the latter, and allege, among other things, that on October 1, 1873, the railroad company had made default in the payment of interest on its bonds, and that large numbers of coupons maturing on that day were presented at the office of the corporation in the city of New York, payment thereof duly demanded and refused. It also rehearses the funding arrangements, and charging that they were based on false and fraudulent statements of the company, the owners of the bonds, who funded their coupons on the faith thereof, are entitled to rescind the agreement and to enforce their claims against the company. It alleges that Osgood had never funded

his coupons. The petition also states that demand was also made at the office of said corporation in New York in December, 1874, for the payment of sundry coupons due April 1, 1874, and which were never funded, or agreed to be so, and that payment thereof was refused, and the said presentment and non-payment was duly evidenced by a public instrument of protest by a notary public in and for said county and city of New York, and the said coupons still remain unpaid; and more than six months having expired since the demand of payment of said coupons in October, 1873, and the default thereon, and more than six months having also expired since the demand of payment of such coupons in December, 1874, and the default thereupon, your petitioners claim that by the conditions of said conveyances the said principal of all and singular the said bonds has also become due, and that there is now due and owing by the said corporation the full sum of $4,700,000 upon said first-mortgage indebtedness.

The petition prays for an account of the sums due on account of the said bonds, and that the mortgage property be sold to satisfy the same, &c.

An answer was filed by R. Biddle Roberts setting up his rights as trustee under the chattel mortgage, and James W. Elwell also answers the amended bill, repeating substantially the allegations of his cross-bill. Fosdick and Fish filed an answer to the cross-bill of Elwell on March 10, 1876, and filed general replications to all the answers to their amended bill. Their answer to the cross-bill contains the following averments:

"These respondents, further answering, upon information and belief admit that certain holders of bonds under the deed of trust to these respondents have determined to demand and require of these respondents that they shall without delay declare the principal of all of said bonds presently due and payable, and will insist that these respondents proceed to prosecute their original bill in this behalf to speedy foreclosure, and procure the sale of the property and franchises of said railroad company to satisfy said bonds.

"These respondents, further answering, say that they are also informed and believe, and therefore charge the fact to be, that other holders of said bonds are in favor of and propose to demand that no such foreclosure and sale shall be had for the present, but what number of bondholders are in the one class or in the other these respondents are not advised and cannot state, but in that regard they say that they will endeavor to faithfully perform all their duties as trustees in this behalf and submit all such questions as may arise to the determination of this honorable court.

"Further answering, respondents say that they are not advised, and cannot state, what precise number the holders of past-due coupons of bonds issued under the trust deed to these respondents have presented for payment, but they allege that it is immaterial whether one or more of said coupons have been so presented; that inasmuch as the said coupons have not been paid, and a large amount thereof, as hereinbefore stated, have long since become due and payable, and these respondents have been by some of the holders of said coupons called upon as trustees to foreclose the said mortgage, they are thereby vested with full authority to proceed to such foreclosure."

An exhibit is filed with the amended bill, being a declaration, signed by Fosdick and Fish, as trustees, which, after reciting the issue of the bonds of March 10, 1869, and the mortgage given to them to secure the payment of the same, and the provision thereof that the principal should become due in case of the specified default in the payment of interest, continues as follows:

"And whereas default has been made by said company in the payment of the half-year year's interest on all of said bonds which fell due on the 1st day of October, A. D. 1873;

"And whereas the coupons for such interest have been presented and payment demanded; and whereas such default has continued for more than six months after such demand; and whereas the holders of said bonds have never consented there-

to, and in consequence thereof the principal of all of the said bonds has become due and payable:

"Now, therefore, the said Chicago, Danville and Vincennes Railroad Company are hereby notified that we, William R. Fosdick and James D. Fish, as trustees as aforesaid, and under and by virtue of the provisions of said trust deed and the authority conferred upon us thereby, do hereby declare the principal of all of said bonds to be due and payable."

Service of this declaration and notice upon the railroad company is acknowledged to have been made February 26, 1875.

Upon the issues thus made by the pleadings, an order of reference was made to a master to take testimony and report the same with his findings, and a large amount of evidence taken before him is contained in the record.

On June 24, 1876, the master filed his report. In it he reported, among other findings, that on October 1, 1873, the said corporation did not pay any of the interest falling due on that day on the issue of bonds dated March 10, 1869, or upon the issue dated March 12, 1872; nor has the said corporation paid any of the subsequent instalments on any of said $400,000,000 bonds falling due at either of the following named days: April 1, 1874; October 1, 1874; April 1, 1875; October 1, 1875, and April 1, 1876; and that demand was duly made for the payment of divers of such coupons on October 1, 1873, and one of such coupons was protested for such non-payment more than six months prior to the institution of this action, or the written notice of such trustees declaring the principal of such bonds to be due and payable, and there is consequently now due to the divers holders of bonds dated March 10, 1869, the sum of $3,505,500. This sum includes the principal of the bonds of the issue of March 10, 1869, the several coupons thereon of the dates mentioned, with interest to July 1, 1876, and the additional sum of $389,500, being twelve and a half per cent. premium on the nominal amount due for payment in gold, according to the stipulation in the bonds and mortgage to that effect.

The master further reported that, as to all matters relating

to the funding scheme referred to in the pleadings, and the effect of the surrender of the funded coupons, and of the failure of the company to pay the coupons due October 1, 1875, he was not required to examine or report upon, and therefore made no finding, nor as to any allegations of fraud set up in the pleadings, no testimony having been taken before or submitted to him upon either matter.

The railroad company filed exceptions to this report, of which the sixth is as follows:

"For that whereas the said master has decided, and in his said report stated, that on the 12th day of October, 1873, said company did not pay any of its interest falling due on that day; that demand was duly made, and that one of said coupons was duly protested for such non-payment more than six months prior to the institution of this action, and to the date of the written notice of the trustees, and, therefore, the said master assumes, and so decides, that the principal and interest of all of said bonds has become due; when the fact is, as shown by the proof offered by the complainants and intervening petitioners, that no coupon was protested until the 19th day of December, A. D. 1874, less than three months prior to the date of said notice and the commencement of this action, and there is no proof that there was ever any other demand upon said company for the payment of said coupons."

On the hearing a decree was rendered, in which, among other findings, it is declared that the railroad company had paid all the coupons on the bonds, both on the Illinois and Indiana divisions, which fell due April 1, 1873, and that none of the coupons which had matured since that date had been paid; that under the two proposals of the company for funding there had been deposited coupons due October 1, 1873, to April 1, 1875, inclusive, on all the $2,500,000 of Illinois division bonds, except $698,500 thereof, which coupons still remained in the hands of Fosdick, as trustee under the agreements; that the semi-annual interest upon the convertible bonds and certificates of indebtedness issued in exchange therefor, which

fell due August 1, 1874, was paid in full, and that the instalment of interest thereon which became due February 1, 1875, was duly paid by said company upon all of the same which were presented for payment, which was the great bulk thereof, and that no interest has been paid on any part of the same since that time; that no payment of interest had been made upon the $698,500 of Illinois division bonds which had not been funded, since payment of the coupon due April 1, 1873.

The decree then recites as follows: "That heretofore, and on the 26th day of February, A. D. 1875, the said complainants, as trustees under the said mortgage or trust deed to them, dated March 10, 1869, did declare the principal of the said twenty-five hundred Illinois division bonds to be due and payable by reason of the default of said railroad company in the payment of certain of the coupons of said bonds which fell due October 1, 1873, payment of which had been duly demanded, and the continuance of such default for more than six months after such demand."

The decree then proceeds to declare that there is due and owing from the railroad company to the complainants, as trustees under the mortgage deed of March 10, 1869, the several sums of $87,500 in gold coin, for the coupons on the $2,500,000 of bonds secured thereby, falling due respectively semi-annually from October 1, 1873, to October 1, 1876, inclusive, less the payments made on account of the four coupons on the convertible bonds and certificates of indebtedness, with interest on said sums at the rate of six per cent. per annum, and, as the decree reads, "in the further sum of two million five hundred thousand dollars in gold coin for the principal of the said Illinois division bonds so declared to be due as aforesaid, together with interest thereon from and after the 1st day of October, A. D. 1876, at the rate of seven per cent. per annum in gold."

It was then "ordered, adjudged, and decreed that the said defendant, the Chicago, Danville and Vincennes Railroad Company, pay, or cause to be paid, to the said complainants as trus-

tees, for the holders of the said Illinois division bonds and coupons, the said several sums of money, with interest thereon, as hereinbefore found to be due and owing, within twenty (20) days from and after the entry of this decree, and in default thereof that all of the said railroad, premises, property, and franchises described in the said trust deed dated March 10, A. D. 1869, and hereinbefore described as the Illinois division of said railroad, &c., and all the right, title, interest, and equity of redemption of the said Chicago, Danville and Vincennes Railroad Company therein, shall be sold as an entirety by Henry W. Bishop, the master in chancery of this court, at public auction, to the highest and best bidder for cash therefor, payable as hereinafter provided, at the west door of the Republic Life Insurance Company building, in the city of Chicago, in the State of Illinois, after having first given notice of the time and place and terms of sale, and a description of the property to be sold, by advertisement thereof in some public newspaper published in the city of Chicago for the space of thirty (30) days prior to such day of sale."

The decree also contains the usual declaration that a conveyance of the title to the property sold, after confirmation of the sale, should be a perpetual bar, in law and equity, against every claim of the railroad company, or other person claiming under it.

Under this decree a sale was had and reported to the court, and confirmed by a subsequent decree, of the mortgaged property to F. W. Huidekoper, T. W. Shannon, and J. M. Denison for $1,450,000, and the purchase-money having been paid, $362,500 in cash, and by the surrender of two million three hundred and twenty-eight thousand dollars of the Illinois division bonds, with the coupons and certificates of indebtedness or convertible bonds thereto attached and belonging, a conveyance of the title to the mortgaged property was made to the purchasers.

It is assigned for error upon the decree of foreclosure and sale, first, that the court below required from the mortgagor

payment of the principal of the debt secured by the mortgage, as then due, and on non-payment thereof within twenty days that the mortgaged property should be sold; and second, that it decreed foreclosure and sale on this condition, without proof of the written request of the holders of the majority of the bonds.

It is undeniable that at the date of the filing of the bill, which was February 27, 1875, the defendant, the Chicago, Danville and Vincennes Railroad Company, was in default for non-payment of the coupons on $698,500 of the issue of $2,500,000 of the Illinois division bonds which matured October 1, 1873. The holders of that amount of these bonds did not fund their coupons and none of them were paid. This failure on the part of the mortgagor constituted a breach of one of the conditions of the mortgage, and, continuing for six months, entitled the trustees under the fifth article to take possession of the mortgaged premises, on being so required by the holders of not less than one-half of the outstanding bonds, and collect the net income, until the default should have been satisfied; or to sell the mortgaged premises, under the power conferred by the sixth article of the conditions. In the latter event the mortgaged premises would have to be sold as an entirety, free from the incumbrance of the mortgage, and the proceeds of the sale would be applied, first, to the payment of the amount due and in arrears, and then to the mortgage debt not then due, and any surplus to the mortgagor. But inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal on any of the bonds, we are of opinion, independent of the provisions of the other articles, that the trustees, or on their failure to do so any bondholder, on non-payment of any installment of interest on any bond, might file a bill for the enforcement of the security by a foreclosure of the mort-

gage, and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforcible by and in the name of the latter, but if necessary may be prosecuted without and even against them. It follows from the nature of the security, and arises upon its face unless restrained by its terms. And in case the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor and all holders of junior incumbrances, if made parties to the suit, and is of the whole premises, when necessary to the payment of the amount due, or when the property is not properly divisible; it conveys a clear and absolute title, as against all parties to the suit, or their privies, and the proceeds of the sale are distributed after payment of the amount due, for non-payment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not. (Olcott *v.* Bynum, 17 Wall., 63; Burrows *v.* Malloy, 2 Jones & Latouche, 526.) This doctrine is stated by this court in Howell *v.* Western Railroad Company, 94 U. S., 466, where an authoritative rule of practice in such cases is prescribed. "We are of opinion, then," say the court, speaking by Mr. Justice Miller, "that there is due from the railroad company to plaintiff the amount of his overdue and unpaid coupons. For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice—a decree which will ascertain the sum so due and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase-money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the pro-

ceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal."

The decree *nisi* mentioned in this extract is like that in suits against infants, in which a day is given to the infant to show cause against it, after he attains full age; and that, where the bill is ordered to be taken *pro confesso*, is preliminary in its nature, requiring a further order to complete it. According to the practice of the English chancery, decrees of this nature in foreclosure suits, after directing an account to be taken of the principal and interest due to the plaintiff upon the mortgage, ordered that upon the defendant's paying to the plaintiff the amount ascertained and certified or found to be due, within six months, at such time and place as were appointed, the plaintiff should reconvey the mortgaged premises; but that in default of such payment the defendant should thenceforth be absolutely debarred and foreclosed of his equity of redemption. It was necessary, however, for the plaintiff, in order to complete his title, to procure a final order confirming it; otherwise the decree of foreclosure would not be pleadable. This order of confirmation he procured on proof to the court of non-payment according to the terms of the decree. (2 Dan. Ch. Pr., 997.)

The time usually allowed by the decree to pay the mortgage debt, whether on a bill to redeem or to foreclose, was six months. But that was not regarded as an absolutely fixed period, but might be varied so as to be reasonable, according to the discretion of the court and the particular circumstances of the case. The courts, however, were very liberal, in cases of foreclosure, in extending and enlarging, from time to time, this period of redemption, though not in cases of bills to redeem, where the mortgagor came into court professing his readiness to pay the amount due, when ascertained, nor in cases of sales, where the mortgagor was not subjected to the severe and absolute forfeiture of his right. (Perine *v.* Dunn, 4 Johns. Ch., 146; Harkins *v.* Forsyth, 11 Leigh, 299.)

Where, according to the English practice, a sale instead of foreclosure was ordered, the form of the decree was the same, directing the sale in the event of a default being made in payment of the amount found due, within the usual time of six months, or within a shorter period, or even immediately if by consent, or where it was considered to be for the benefit of all parties. (2 Dan. Ch. Pr., 1266.)

In the early practice in Kentucky, the preliminary decree finding the amount due and giving day for payment, was interlocutory merely, and separate from the subsequent decree finding the default in not performing the former decree and directing a sale in consequence thereof. (Downing *v.* Palmateer, 1 Monroe, 64; Oldham *v.* Halley, 2 J. J. Marsh., 117; Hanks *v.* Greenwade, 5 J. J. Marsh., 250; Champlin *v.* Foster et al., 7 B. Monroe, 104.) The ground of this practice seems to have been that the mortgagor had the right to have the record show that he had failed to pay according to the decree *nisi* before a sale of his property was ordered. But there seems to us to be no sufficient reason why, as it was according to the English practice, and generally in this country, all these matters may not be embraced in a single decree. What is indispensable in such a decree is that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay, within a reasonable time, to be fixed by the court, and which if not paid a sale of the mortgaged premises is directed. (Woodward *v.* Fitzpatrick, 2 B. Monroe, 62.)

This is that final decree of foreclosure and sale which determines and fixes the rights of the parties, and from which, on that account, an appeal lies. (Ray *v.* Law, 3 Cranch, 179; Whiting *v.* Bank of the U. S., 13 Peters, 15; Forgay *v.* Conrad, 6 How., 204; Railroad Co. *v.* Swasey, 23 Wall., 409.)

But as in cases of strict foreclosure, so in case of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest and costs, he will be allowed to redeem.

It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption. (Brine *v.* Insurance Co., 96 U. S., 632.)

It is obvious that the finding of the amount due, for nonpayment of which, according to the terms of the decree, the mortaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. (Bigler *v.* Waller, 14 Wall., 297; Shillaber *v.* Robinson, 97 U. S., 707.) In Clark *v.* Reaburn, 8 Wall., 318, a decree of strict foreclosure, which contained no finding either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or redeem, was reversed on these grounds, although the bill was taken *pro confesso* as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences undoubtedly would have followed if it had been a decree of foreclosure and sale instead of a strict foreclosure; and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due.

It becomes, then, of the first importance to ascertain whether

the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due.

The errors alleged in the amount are two. The first is that there was declared to be payable $252,220, the amount of the several coupons maturing from October 1, 1873, to April 1, 1875, both inclusive, the payment of which, it is claimed, as to all the bonds of the Illinois division, except $698,500 thereof, had been, by the funding agreements, extended until February 1, 1879. The second is that the principal sum of $2,500,000 of these bonds, contrary to the agreement between the parties, was also declared to be due and payable. The appellants insist that the only indebtedness of the railroad company to the bondholders, represented by the complainants at the time of the filing of their bill, was the past-due interest on six hundred and ninety-nine bonds, the interest warrants of which had not been funded, amounting to about the sum of $147,000.

It appears from a statement in the record, admitted to be correct, that there had been deposited and exchanged for convertible bonds the four coupons maturing on and from October 1, 1873, to April 1, 1875, on $271,500 of the Illinois division bonds, and that by the terms of the agreement under which that exchange was effected, dated November 11, 1873, it was not to be binding unless assented to in writing by a majority in interest of the bondholders. In point of fact such majority did not assent to it; but under the second proposition, dated November 20, 1873, the four corresponding coupons on $1,530,000 of the bonds were deposited and exchanged for certificates of indebtedness.

It appears further that the railroad company paid the accruing interest on the convertible bonds and certificates of indebtedness, issued under these arrangements, which became due prior to the filing of the bill, except $3,167.77 which was not presented. The default in respect to the coupons surrendered was, by the terms of the funding agreements, waived as long as the interest upon the securities substituted for them was

punctually paid; so that at the date of the filing of the bill there was no subsisting default in the payment of interest, except upon the $698,500 of bonds which had not been funded.

The master finds, and his report in that respect is the predicate of the decree, that divers coupons falling due October 1, 1873, were presented on that day, and that payment thereof was demanded and refused, and that one of such coupons was protested for such non-payment more than six months prior to the institution of the suit and the written declaration of the trustees that the principal of the bonds had thereby become due.

There are some statements in the answers, and in the testimony of some of the witnesses, that coupons due October 1, 1873, were presented for payment and were not paid; but there is no proof of the fact as to any particular coupon identified for that purpose, and we have carefully searched the record in vain for any evidence whatever that any coupon not afterwards funded was presented, and payment thereof refused. The master himself does not report any such. It is entirely consistent with his finding, and with the evidence on which it professes to be founded, that the payment of every coupon falling due October 1, 1873, presented for payment on or after that day, and payment whereof was refused, was extended by the subsequent agreements to fund them. The intervening petition of Osgood and others, if it be considered as a pleading whereby they were allowed to become co-complainants, does not allege that any one of the coupons held by them was presented for payment. It is averred that large numbers of the coupons maturing on October 1, 1873, were presented and payment thereof was demanded and refused on that day; but the allegation that any such coupon was held by either of the petitioners seems to have been studiously avoided; and stress is laid on averments of fraudulent misrepresentations which induced bondholders to fund their coupons, in support of which the master reported that no testimony was offered, and upon the insolvency of the company, which is entirely immaterial upon the

question of an actual default. It is averred in the petition that coupons were presented and payment demanded in December, 1874, which had become due the previous April, and the master so reports as to one; but the only evidence that appears in the record is an admission of the railroad company in its sixth exception to the master's report, where it is accompanied by the statement that such demand and refusal was less than six months before the filing of the bill, and could not, therefore, have been the foundation of the declaration that the principal of the mortgage debt had become payable, which in fact was not predicated upon that default, but rested solely on the non-payment of the coupons due October 1, 1873.

There is nothing in the record to show that any one of the bondholders who had funded his coupons claimed the right to rescind the funding agreements, or that any step to do so had been taken or authorized.

It is true that after the filing of the bill and the appointment of a receiver the railroad company ceased to pay interest upon its securities. That was but the natural consequence of the litigation; and in taking a decree for foreclosure and sale it might have been in strict accordance with the equitable rights of bondholders who had funded their coupons to have rescinded the funding agreements as incapable of execution. But the legal effect of this would have been merely to find as the true amount of the mortgage debt then due, necessary to be paid to avoid a sale, the whole amount of interest unpaid on all the coupons. It would not, however, have put the company in default as to the funded coupons from the beginning, nor deprived it of the benefit of the waiver of that default arising from the fact of funding. It would have cancelled the arrangement only as and from the date of the decree itself, without impairing its antecedent effect by retroaction. It is true that where a mortgage has been given to secure a debt payable in instalments, and a bill has been filed for foreclosure and sale, upon a default as to one, the decree may require payment of all instalments then due, though maturing since the institution

of the suit; but that principle does not suffice to bring the case of the appellees within the meaning of the eighth article of the conditions of the mortgage, so as to justify the decree requiring payment of the principal of the debt as presently due. For by the terms of that provision the entire debt does not become absolutely due on the default of the company, continued for six months without the consent of the holder to pay an interest coupon; but only at the election of the trustees, as declared by them and notified to the mortgagor. And the forfeiture of the time of payment to be established in a given case must stand or fall upon the fact of such declaration and notice, as it may be justified or not by the circumstances existing when they were made. It cannot be supported by subsequent occurrences. It follows, therefore, that the claim in support of the finding that the whole debt had become due, must rest exclusively upon the alleged default of October 1, 1873, and that, as we have seen, is not sufficient.

It does not affect this conclusion that by the terms of the sixth article of the conditions of the mortgage it is provided that upon the exercise of the power thereby conferred, resulting in a sale of the mortgaged premises for a single default in the payment of interest, (it may be one coupon merely,) the property is to be sold as an entirety, and free of the incumbrance of the mortgage, so as to pass all the title, both of mortgagor and mortgagee, and that the proceeds of the sale are to be applied, after payment of overdue interest, to the payment of the principal of the debt, though not yet due. This provision does not, either in terms or in effect, make the whole debt due before the stipulated day of payment. It is simply the application to the case of a sale by the trustees under the power of the practice of courts of equity in cases of judicial sales upon foreclosure. In either case the right of the mortgagor to redeem and thus prevent the sale is preserved, on payment not of the unmatured principal sum of the debt, but merely of the interest then actually due and in arrears—the very right which by the decree now in question was denied.

If authority is needed on such a proposition, it will be found in Holden v. Gilbert, 7 Paige Ch. Rep., 208, and Olcott v. Bynum, 17 Wall., 62.

This right cannot be regarded as other than important and valuable. Its denial in the present case was a substantial and serious wrong. This is manifest from the bare statement that the decree required payment, within twenty days, of $2,500,000, which we find was not due, as a condition of preventing the sale of property which it is admitted was worth more than this debt, and which according to the testimony in the case was earning more than enough to pay the current interest on this mortgage. The receiver states the net earnings for the year 1874 at $330,615.75, and adds, speaking July 31, 1875, that "the present year, like the preceding, is of almost unexampled depression in most branches of business upon which the consumption of coal depends," the transportation of which was the main traffic of the road; and adds that he believes, on the reasons he states, that "it is practicable in a year of fair prosperity to increase the earnings from fifty to eighty per cent. over those of 1874." Upon such a showing it is immaterial to say that the railroad company was commercially insolvent, not being able to pay all its obligations as they matured; for the fact, if admitted, would not affect its legal or equitable rights, much less be allowed to deprive its other creditors, junior incumbrancers, and lienholders of their right to prevent a sale and sacrifice of the property by paying the comparatively small amount of the interest justly due upon the first-mortgage bonds, and thus preserving their own estates and interest as well as those of the mortgagor.

The second assignment of error which we have noted is, in our opinion, also well founded.

The eighth article of the conditions of the mortgage, which relates to this subject, contains the provision that after the principal of the bonds has been declared by the trustees to have become due by reason of the default therein described, and the mortgagor notified thereof, that the trustees, "upon the writ-

ten request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as herein provided."

It is contended on behalf of the appellees that without the last clause the trustees have the sole right to act according to their discretion and upon their own motion in declaring the principal sum due on account of the default, and that upon such declaration and notice by the trustees the whole sum becomes due irrevocably for all the purposes of the mortgage; so that thereafter the trustees at their option may file a bill for foreclosure and sale, or may intervene in case such a bill is filed by any bondholder, and thereupon the amount decreed must be the amount thus declared to be and hence actually due; and that the office of the clause in reference to the written request of a majority of the bondholders is merely to make the obligation of the trustees imperative instead of optional.

We cannot agree to that construction of the provision. The whole article must be taken together. It is in fact a unit and is directed to a single end. And the nature of the provision and the character of its object must be taken into consideration as furnishing the rule of its interpretation. It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy. And while it is in the nature of a forfeiture, it is one against which, when it has taken place according to the fair meaning of the parties, courts of equity will not relieve. It was so held in Noyes *v.* Clark, 7 Paige Chy., 179; Noonan *v.* Lee, 2 Black, 509; Olcott *v.* Bynum, 17 Wall., 62.

The stipulation, nevertheless, is in the nature of a penalty, and may be regarded as *stricti juris*, to be construed fairly and reasonably according to the meaning of the parties, but leaning, if need be, in any case of ambiguity, in favor of the debtor. And the construction, in the present instance at least, which favors him does not discriminate against the bond

holders as a class, but rather between the interests of the whole number represented by the trustees and controlled by a majority, and those of a single creditor, or a minority, associated in the like case pursuing their remedy as individuals. For while, as we have seen, one or any number of bondholders may prosecute a bill to foreclose the mortgage upon default as to payment of a single coupon, or the trustees may intervene on behalf of all for the same purpose because the failure to pay a single instalment of interest is made a breach of the condition of the mortgage, yet it is apparent that one purpose at least of the clause in question was to protect the bondholders as a class against the views of individuals and combinations of individuals, being a minority, pursuing separate interests.

In declaring the principal sum due before the date fixed by the credit upon a default in the payment of interest, the trustee is acting for the whole number of bondholders, and the provision that subjects his action in enforcing the stipulation to the wishes of a majority is meant, as we think, for the protection of the class. Many cases may be mentioned to illustrate the importance in the interests of such a control, rather than to put it in the power of one, or a minority, to require all to accept what the majority might consider to be a premature and less valuable satisfaction for their existing security. The larger number might think it to their advantage even to defer the collection of their overdue interest, much less not to anticipate the payment of the principal, even when the security was ample to meet both; for they might esteem the ultimate investment higher than present payment. While they could not and ought not to prevent others, even a single individual, from exacting the promptest payment of what is due and may be important as current income, by legal process, they may nevertheless rightfully object to an anticipation of payment that may in their opinion prove to be a sacrifice. And this becomes especially important when the present value of the security is insufficient to prepay the incumbrance, but con-

tains the solid promise of future indemnity as an investment. It is that interest, we think, that dictated the clause in question, and can be satisfied only by the construction which secures to the majority of the bondholders the right to veto the proceeding of the trustees.

Indeed, the other construction contended for, which gives to the majority only the right to make the obligation of the trustees to proceed imperative, renders it nugatory; for upon that supposition, the debt having become fully due by the declaration and notice of the trustees for all the purposes of the mortgage, if they should delay or refuse to file a bill for foreclosure and sale, it would still be in the power of a single bondholder to proceed for himself and associates directly for the same object, and to procure the same relief.

It is therefore our opinion that even had the trustees rightfully declared the principal sum of the mortgage debt due, and given the proper notice thereof, nevertheless the foundation for proceeding to foreclose for that cause, and of the decree requiring payment of that amount, would fail, without proof that the bill had been filed for that purpose, upon the written request of the holders of a majority of the bonds then outstanding. It is not disputed that no such proof is to be found in this record.

Other errors than those already discussed have been assigned upon both appeals, which, as in the further progress of the cause they may not arise again, we have not considered, and do not therefore pass upon.

For the reasons already given we reverse both decrees appealed from, and remand the cause with instructions to proceed in conformity with this opinion.

WAITE, C. J. (dissenting.)—I am unable to agree to the judgment in this case. In my opinion default had been made in the payment of the interest on some of the bonds within the meaning of the eighth clause of the mortgage. The company having given notice that the coupons due October 1, 1873,

would not be paid if presented, no presentation was necessary in order to create the default. This notice was a waiver of a presentation in form. Coupon-holders were in effect told it was useless to make a demand, because if made it would not be met. Confessedly this default as to the coupons on $698,000 of the bonds continued more than six months. Holders of bonds to this amount declined to enter into the scheme for extension. They kept their coupons, hoping some plan might be devised for payment, but retaining all their rights under the mortgage if their hopes were not realized.

This default having happened, and having continued more than six months without the consent of the holders of the coupons, by the express terms of the eighth clause the principal of all the bonds secured by the mortgage became immediately due and payable. If, after that, the holders of a majority of the outstanding bonds had requested the trustees in writing to foreclose the mortgage, it would have become the imperative duty of the trustees to institute the necessary proceedings for that purpose. But if no such request was made, it seems to me that the trustees were not precluded from commencing such proceedings on their own motion, in case the safety of the trust made it necessary. It is possible, if a majority of the bondholders had, in an appropriate way, interfered to prevent the trustees from going on, some relief might have been afforded them; but when all came in and availed themselves of what had been done, the corporation was in no position to defend, because a request had not been formally made in advance. As to the corporation, the principal of the bonds became due and payable when a default occurred which continued the requisite length of time. Whether a foreclosure should be had because of the default, rested alone with the bondholders and trustees. The provisions in the mortgage for the written request was, as it seems to me, not for the protection of the company, but the bondholders. If the bondholders are satisfied with what the trustees have done, the corporation is in no condition to complain.

Statement of the case.

That the trustees were justified in commencing proceedings on their own motion, seems to me clear. Some of the bondholders, having coupons and bonds as to which default had been made, began a suit for foreclosure in a State court and secured the appointment of a receiver. The company was very much embarrassed financially, and, so long as the receivership continued, could do nothing to extricate itself from its difficulties. It was a necessity, therefore, for the trustees to interfere. When they did, the company did not relieve itself from the consequences of its default in the payment of coupons on the $698,000 of bonds. All the bondholders seem to have been satisfied with what was done, and they united with the trustees in pressing the foreclosure.

Under these circumstances, in my opinion, the court properly treated the principal of all the bonds as due, and decreed accordingly.

I am authorized to say that Mr. Justice HARLAN concurs in this dissent.

REVERSED.

THE CITY OF ST. LOUIS v. THE KNAPP, STOUT & CO. COMPANY.

March 6, 1882.

In a chancery suit by a wharf-owner to enjoin the driving of piles and construction of a run-way out into a river, the allegation that "the effect of driving the piles in the bed of the river and constructing the run-way will be to divert the river from its natural course and throw it east of its natural location, and from the river bank north and south of said run-way and piling, and create in front of and upon plaintiff's improved wharf a deposit of mud and sediment, so that it will be impossible to land at plaintiff's wharf," is not a mere expression of opinion or apprehension, but a sufficiently certain and minute allegation of facts, and is not demurrable.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

This is a suit by the city of St. Louis against the defendant in error, a corporation created under the laws of the State of

Wisconsin. It was commenced by petition filed in the Circuit Court of that city, and was thence removed, upon the application of the defendant, into the Circuit Court of the United States for the Eastern District of Missouri. The defendant, treating the petition as a bill in equity, filed its demurrer, which was sustained. The complainant elected to abide by the bill, and it was dismissed with costs. This appeal, therefore, presents the question whether the city, upon the showing made by its bill, is entitled to the relief asked.

The case, as made by the averments of this bill, is this: Since the year 1822 the city has been, as it still is, a municipal corporation, its eastern boundary being the middle of the main channel of the Mississippi River. It is the proprietor of the bed of that river within the city limits, and by its charter is authorized to construct all needful improvements in the harbor; to control, guide, or deflect the current of the river; to erect, repair, and regulate public wharves and docks; to regulate the stationing, anchoring, and mooring of vessels and wharf-boats within the city; to charge and collect wharfage, and to set aside and lease portions of the improved wharf. By an ordinance to establish and open the wharf from Biddle street to the northern boundary of the city, and from Hazel street to its southern boundary, the lines of the wharf have been laid down and established upon a certain piece of real estate fronting the river, and the southern boundary of which is about three hundred and twenty feet north of the north line of Bremen avenue, produced to the river. The defendant is engaged in the business of manufacturing and selling lumber, and is erecting a saw-mill upon the premises just described.

For the purpose of hauling saw-logs from the river, the defendant is constructing a run-way, extending from the mill into the river, a distance of about one hundred feet eastwardly from its western bank. It is also driving piles in the bed of the river east of the eastern boundary of its premises, and east of the eastern line of the wharf as established by the city. Portions of the wharf, established by the ordinance, to the

north and to the south of defendant's premises, have been improved and completed by the city, and are used for landing boats and vessels engaged in navigation.

After averring in substance these facts, the bill proceeds: "That the effect of driving the piles in the bed of the river and constructing the run-way as aforesaid, as proposed and intended by defendant, will be to divert the navigable water of the Mississippi River from its natural course and throw it east of its natural location, and from along the river bank north and south of said run-way and piling, and create in front of and upon plaintiff's improved wharf as aforesaid a deposit of mud and sediment, so that it will be impossible for boats and vessels engaged in navigating the Mississippi River to approach or land at the improved wharf north and south of defendant's premises."

The formal allegation is then made that the act of defendant in building the proposed run-way and driving piles east of the western water's edge and in the bed of the river is a legal wrong for which no adequate remedy can be afforded by an action for damages, and will be a substantial impairment of and obstruction to the navigation of the river.

The prayer of the complaint is that the defendant, its agents and servants, be forever enjoined from driving piles and constructing its run-ways east of the western water's edge in front of its premises; that it be required to remove the piles already driven and the run-way so far as constructed; and that the city have such other and further relief in the premises as may be proper.

Leverett Bell, for appellant.

J. M. & C. H. Krum, for appellee.

HARLAN, J.—Upon the hearing of the demurrer two questions were considered by the court, viz.: first, whether the bill, upon its face, shows that the construction of the run-way will intrude upon the city's rights and cause special damage;

second, whether, upon its allegations, the city is entitled to a decree in advance of the construction, and to prevent the completion of the work sought to be enjoined.

The Circuit Court, in disposing of the demurrer, waived a final decision of the first question, expressing, however, some doubt as to whether the bill brought the case within the general rule that a suit in equity to enjoin or abate a public nuisance must be brought by one who has sustained, or is in danger of sustaining, individual special damages, apart from those suffered by the community at large.

Touching the second question, the court below remarked it was very clear that a public navigable stream must remain free and unobstructed; that no private individual has a right to place permanent structures within the navigable channel; and that if the proposed run-way, when completed, proved to be a material obstruction to the free navigation of the river, or a special injury to the rights of others, it might be condemned and removed as a nuisance. It was, however, of opinion that the case presented was one of a threatened nuisance only, and that the reasons assigned for interference by injunction, in advance of the construction of the run-way, were not sufficient.

We are of opinion that the demurrer should have been overruled and the defendant required to answer. The bill makes a *prima-facie* case not only of the right of the city to bring the suit, but for granting the relief asked. It distinctly avers what the defendant proposes to do, and that averment is accompanied by the general charge or statement that the driving of the piles in the bed of the river, and the construction of the run-way, will not only cause a diversion of the river from its natural course, but will throw it east of its natural location, from along the river bank north and south of the proposed run-way and piling, creating in front of the city's improved wharf a deposit of mud and sediment, and rendering it impossible for boats and vessels engaged in the navigation of the Mississippi River to approach or land at the improved wharf north and south of defendant's premises.

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This is not, as ruled by the Circuit Court, merely the expression of an opinion or apprehension upon the part of the city, but a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests its claim for relief. It was not necessary in such a case to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet. There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law. (Cooper's Eq. Plead., 5.) But, in most cases, general certainty is sufficient in pleadings in equity. (Story's Eq. Pl., secs. 252, 253, p. 228, 9th ed., by Gould.) Let the case go back for preparation and hearing upon the merits. If it should be again brought here we may find it necessary to discuss the numerous authorities cited in the arguments of counsel. In its present condition we do not deem it wise to say more than we have in this opinion.

The judgment is reversed, with directions to overrule the demurrer, and for further proceedings according to law.

REVERSED.

JOSEPH A. THATCHER AND JOSEPH STANDLEY v. WATSON B. ROCKWELL.

March 6, 1882.

1. Inasmuch as an assignment of a claim made more than four months before going into bankruptcy leaves no interest in the assignor to vest in the assignee in bankruptcy, a suit on such assignment in the name of the assignor for the benefit of the transferees is maintainable, and need not be revived in the name of the assignee in bankruptcy.
2. A suit instituted before proceedings in bankruptcy by one who afterwards becomes a bankrupt may be prosecuted in the same form, if the assignee consents thereto, without making the assignee a party on the record; and inasmuch as the assignee in such event is bound

by the decision, the debtor is sufficiently protected, and cannot set up bankruptcy of the creditor as a defense.

ERROR to the Supreme Court of the State of Colorado.

On motion to dismiss, with which is united a motion to affirm.

H. M. Teller and *Willard Teller*, for plaintiffs in error.

J. S. Charles and *J. B. Belford*, for defendant in error.

WAITE, C. J.—On the 10th of June, 1875, Rockwell, the defendant in error, brought an action of assumpsit against Thatcher & Standley, the plaintiffs in error, in a State court of Colorado. The declaration on which the trial was had contained the common counts only. The original pleas were the general issue, payment, and set-off, but on the 26th of March, 1877, a supplemental plea was filed, to the effect that on the 26th of May, 1876, Rockwell had been adjudicated a bankrupt, and on the 14th of July, 1876, an assignee appointed, to whom the claim in suit passed under the operation of the bankrupt law; wherefore the defendants "prayed judgment if said plaintiff could longer have or maintain his action against them." To this plea a replication was filed confessing the bankruptcy and the appointment of an assignee, but averring that the claim in suit had been assigned to Kate Rockwell and L. C. Rockwell in November, 1875, and did not pass to the assignee. It was also averred that the suit was being prosecuted for the use and benefit of the persons to whom the transfer had been made, and that the assignee in bankruptcy claimed no interest whatever therein. To the replication the defendants rejoined, denying the assignment to the Rockwells.

Upon this issue, among others, a trial was had, and at the conclusion of the testimony the defendants asked the court to instruct the jury—

"3. That if they believe from the evidence that the plaintiff, after the commencement of the suit, filed his petition in bank-

ruptcy and was adjudged a bankrupt, and an assignee in bankruptcy was appointed, then the plaintiff cannot recover in this action; for if he had any legal claim against the defendants at the time the assignee in bankruptcy was appointed, the same vested in the assignee in bankruptcy."

This instruction was refused, and the court did charge as follows:

"4. The court further instructs the jury that if they believe from the evidence that Watson B. Rockwell, previous to his bankruptcy, assigned the claim now in suit to his wife Kate and L. C. Rockwell, one-half to each, for a valuable consideration, that this suit is well maintained in W. B. Rockwell's name for their use and benefit, notwithstanding you may believe from the evidence that Rockwell was adjudged a bankrupt in May, A. D. 1876.

"6. The court instructs the jury that the defendants cannot avail themselves of the bankruptcy of the plaintiff if they believe from the evidence that the money claimed was assigned to the said Kate Rockwell and L. C. Rockwell four months before Rockwell's petition in bankruptcy was filed, and even if there had been no assignment of this claim the defendants could not avail themselves of the bankruptcy if it appeared from the evidence that the assignee in bankruptcy expressly consented that the plaintiff might continue to prosecute the claim in his own name in this court."

Exceptions were taken in due form and incorporated into the record. The case is here on a writ of error to the Supreme Court of the State for the review of a judgment overruling these exceptions.

A motion is now made to dismiss the writ for want of jurisdiction, and with that is united a motion under rule 6 to affirm.

By the exceptions to the charge a Federal question is undoubtedly presented upon the record. The court was asked to decide that the proceedings in bankruptcy were a bar to the further prosecution of the suit in the name of the bankrupt.

This was refused, and the jury were told that they might bring in a verdict for the plaintiff notwithstanding the bankruptcy, if they found in his favor on the other issues, and the claim had been assigned, as alleged in the replication, more than four months before the petition in bankruptcy was filed. We must, therefore, overrule the motion to dismiss, but what the court did was so clearly right that we are not inclined to retain the cause for further consideration on its merits. An assignment in bankruptcy only transfers to the assignee such property as the bankrupt had when the petition in bankruptcy was filed. If in point of fact the claim in suit was transferred by the bankrupt more than four months before the proceedings in bankruptcy were begun, the assignee in bankruptcy had no interest whatever in the suit that was pending, because from the time of the transfer the tranferees became entitled to the benefit of any recovery that might be had. The suit, though in the name of the bankrupt, was in fact for and on account of the transferees, whose trustee the bankrupt became when the transfer was completed.

The further charge of the court, to the effect that if the assignee expressly consented that the bankrupt might continue to prosecute the suit in his own name the defendants could not avail themselves of the bankruptcy as a defense, was also right. By section 5047 of the Revised Statutes the assignee may prosecute or defend suits pending in the name of the bankrupt at the time of the bankruptcy, but there is nothing which renders it necessary for him to make himself a party on the record to do what is thus allowed. What was said in Herndon *v.* Howard, 9 Wall., 665, must be construed in connection with the case then under consideration, which was an application by an assignee to be substituted in this court for the original appellant, who had become bankrupt after the appeal was taken. The true rule is stated in Eyster *v.* Gaff, 91 U. S., 521; Burbank *v.* Bigelow, 92 U. S., 183; Norton *v.* Switzer, 93 U. S., 364; Jerome *v.* M'Carter, 94 U. S., 737; M'Henry *v.* La Societé Française, 95 U. S., 60, and Davis *v.* Friedlander, at this

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term, which, although cases where the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest *pendente lite*. It is no defense to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor.

The motion to dismiss is denied, but that to affirm granted.

AFFIRMED.

THE UNITED STATES v. THE REAL ESTATE SAVINGS BANK OF PITTSBURG.

March 6, 1882.

1. An allowance of a claim by the Commissioner of Internal Revenue under section 3220 of the Revised Statutes of the United States for taxes, &c., illegally assessed, is equivalent to an account stated between private parties, and is binding on the United States until impeached for fraud or mistake, and is *prima-facie* evidence of the amount due, and if not paid on application to the Treasury Department, the Court of Claims has jurisdiction of an action based thereon; because such an allowance raises an implied promise on the part of the United States to pay any amount actually due the claimant, and a claim for the payment of such allowance is founded on an act of Congress within the meaning of the law defining the jurisdiction of that court.
2. The lodging of the appeal made out in due form with the proper collector of internal revenue for the purpose of transmission to the Commissioner in the usual course of business, under the requirements of the regulations of the Secretary, was in legal effect a presentation of the appeal to the Commissioner under the provisions of section 3228 of the Revised Statutes of the United States.

APPEAL from the Court of Claims.

S. F. Phillips, *Solicitor-General*, *John S. Blair*, and *William Lawrence*, for appellants.

J. W. & G. L. Douglass, for appellees.

WAITE, C. J.—Sections 3220 and 3228 of the Revised Statutes are as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. * * *

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued. * * * "

The material regulations prescribed by the Secretary of the Treasury applicable to this case are these:

"Claims for the refunding of taxes erroneously assessed and collected should be presented through the collectors of the respective districts upon blank form No. 46. * * *

"The collector should keep a perfect record, in a book furnished for the purpose, of all claims presented to the Commissioner, and must certify as to each claim whether it has been before presented or not.

"Where the case of an appeal involves an amount exceeding two hundred and fifty dollars, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement."

For some years it has been the practice of the officers of the Treasury Department to regard appeals for refunding taxes

illegally assessed and paid, when deposited with collectors, under the rules, in season to be forwarded to Washington within the two years' limitation, to have been duly presented to the Commissioner according to law.

On the 10th of July, 1878, the Real Estate Savings Bank of Pittsburg, Penn., paid to the collector of internal revenue for the proper district in Pittsburg certain internal taxes which had before that time been assessed, and on the 9th of July, 1880, it presented to the same collector at his office an appeal to the Commissioner of Internal Revenue, made out on the blank form prescribed by the Secretary, to refund and pay back $972.69 which, it was alleged, had been illegally assessed and erroneously paid. This appeal was delivered to the collector in time to have reached Washington by due course of mail on the 10th of July, if it had been promptly forwarded, but it was retained until the 15th, when it was sent to the Commissioner, with an indorsement by the collector that he had investigated the facts and found the statements of the claimant were in all respects true. The papers reached the Commissioner on the 17th of July, and he, on the 13th of October following, submitted them to the Secretary of the Treasury, as required by the regulations, for his consideration and advice. On the 18th of October the Secretary signified to the Commissioner his approval of the payment of the claim, and on the 21st the Commissioner certified its allowance. On the presentation of this certificate through the accounting officers of the Treasury Department payment was refused. The certificate has never been revoked by either the Secretary or the Commissioner, but it is still in force, so far as the action of these officers is concerned. After payment was refused suit was brought on the certificate in the Court of Claims, where judgment was given for the claimant. From this judgment the United States appealed.

The objections made here to the recovery are, in substance, (1) that the Court of Claims had no jurisdiction of the suit, because the claim sued for was not founded on any law of

Congress, or upon contract; and (2) that the appeal to the Commissioner of Internal Revenue was not taken within two years after the cause of action accrued, and that consequently the allowance by that officer was without any authority of law.

The first of these objections is, we think, disposed of by United States *v.* Kaufman, 96 U. S., 567. That case arose under section 3426 of the Revised Statutes, which is as follows:

"The Commissioner of Internal Revenue may, from time to time, make regulations, upon proper evidence of facts, for the allowance of such of the stamps issued under the provisions of this chapter, or any internal revenue act, and may have been spoiled, * * * * and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value, after deducting therefrom, in case of repayment, the sum of five per cent., to the owner thereof. * * * * "

And we held that the allowance of a claim by the Commissioner under this section was equivalent to an account stated between private parties, and binding on the United States until in some appropriate form it was impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims; because such an allowance raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant, and also because the claim for the payment of such an allowance would be founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court. We cannot discover any material difference between the powers of the Commissioner under section 3426 and those which he has under section 3220. Under section 3426 he is to "allow" the claim, which is done either by giving other stamps in lieu of those that have been spoiled, &c., or by repaying the amount or value. Under section 3220 he is to "refund" and "pay back." His payments of money

in both cases must be made through the accounting officers of the Treasury Department, as he is not himself a disbursing officer. Whether his allowance is conclusive on the other officers through whose hands it must necessarily pass before it can be paid by the treasurer, we did not then, and need not now, decide. All we said then, and all we say now, is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima-facie* evidence of the amount that is due, and put on the government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress. Until an appeal is taken to the Commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. If on the appeal the claim is rejected, an action lies against the collector, (Revised Statutes, section 3226,) and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the government in the Court of Claims. This, as it seems to us, is the logical result of the legislation of Congress upon the subject. A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims. To say the least, the decision of the Commissioner on the appeal is sufficient to determine whether one

form of remedy shall be resorted to by the claimant, or the other.

Upon the other branch of the case we are entirely satisfied with the conclusion reached by the court below, and that the lodging of the appeal, made out in due form with the proper collector of internal revenue for the purpose of transmission to the Commissioner in the usual course of business, under the requirements of the regulations of the Secretary, was in legal effect a presentation of the appeal to the Commissioner. The effect of the regulation was to designate the office of the collector of internal revenue as a proper place for the presentation of the appeal. The whole subject is so fully and satisfactorily considered in the opinion below that we deem it unnecessary to do more than refer to what is there said.

The judgment is affirmed.

AFFIRMED.

THE UNITED STATES v. JOHN BARNETT AND BENJAMIN F. CALDWELL.

APPEAL from the Court of Claims.

This judgment is affirmed on the authority of United States *v.* Kaufman, 96 U. S., 567, from which it cannot be distinguished in principle.

JOHN L. HEALD v. HARVEY W. RICE.

March 6, 1882.

1. If it appears from the face of original and reissued patents that extrinsic evidence is not needed to explain terms of art, nor to apply the descriptions to the subject-matter, so that the court is able to say from mere comparison what are the inventions described in each, then the question of identity is one of pure construction by the court and not of fact for a jury.

2. The original patent No. 146,614, dated January 20, 1874, issued to H. W. Rice, *construed* to be for a return-flue boiler, including new and useful improvements in steam boilers, in which the mode of supplying straw to the grate is merely incidental; and his reissued patent No. 6,422, granted May 4, 1875, *construed* to be for a particular mode of using such boiler, with straw as a fuel, by means of an attachment to the furnace-door for the purpose; and hence his reissued patent is void as being for a different invention from that contained in the original—the one being for a machine, the other for a process.
3. And the reissued patent is anticipated by patents issued to David Morey, which cover a combination of the furnace of a threshing engine with a detachable box or tube provided with a flaring mouth for the purpose of feeding with straw; for these patents cover the attachment of such an arrangement to any boiler, and the mere discovery by another party that it works better on one kind of boiler than on another is not patentable.
4. Nor is the mere combination by a third party of the patent of one man with the patent of another, each operating separately and producing its own results, patentable.

ERROR to the Circuit Court of the United States for the District of California.

George Harding and *John H. Boalt*, for plaintiff in error.

M. A. Wheaton, for defendant in error.

MATTHEWS, J.—This was an action at law brought by Rice to recover damages for an alleged infringement of reissued letters-patent No. 6,422, granted May 4, 1875, to him for improvements in steam boilers. The original patent was No. 146,614, dated January 20, 1874. The invention, as stated in the complaint, consisted, among other things, of a combination of a straw-feeding attachment with the furnace-door of a return-flue steam boiler, for the use of straw alone as fuel, in generating steam ample for practically operating steam engines.

The case was tried by a jury, and resulted in a verdict and judgment for the plaintiff; to reverse which this writ of error is prosecuted.

A bill of exceptions sets out the exceptions of the plaintiff

in error to the rulings of the court below, and all the evidence. The court was asked at the close of the plaintiff's testimony, and again when all the evidence on both sides had been introduced, to instruct the jury to return a verdict for the defendant, the refusal to do which, amongst other rulings, is assigned for error; and thus the whole case on the merits is brought here for review, so far as they rest upon questions of law.

The plaintiff below introduced in evidence his original and reissued patent. For the purpose of comparison, which, in view of the questions of law raised, becomes important and necessary, the specifications and claims are exhibited here in parallel columns, using one copy for both patents when they are identical, and putting all the language that is in the original and not in the reissued patent in the left-hand column in italics, and putting in the right-hand column, in italics, all the language used in the reissued patent that is not in the original:

"Specifications forming part of letters-patent No. 146,614, dated January 20, 1874.

| *Reissue No.* 6,422, *dated May* 4, 1875,

application filed

November 3, 1873. | *March* 17, 1875.

"*To all whom it may concern:*

"Be it known that I, Harvey Wood Rice, of Haywood, Alameda county, State of California, have invented new and useful improvements in steam boilers; and I do hereby declare the following description and accompanying drawing are sufficient to enable any person skilled in the art or science to which it most nearly appertains to make and use my said invention without further invention or experiment.

"My invention relates to

| *the combination of a straw-feeding device with the furnace-door of that class of boilers which are known as return-flue boilers, by*

certain improvements in the construction of steam boilers whereby I am enabled to utilize straw and other light substances for fuel, so that a complete combustion of the smoke is attained, and which combination I am able to provide a superior arrangement for utilizing straw as a fuel for generating steam.

Many attempts have heretofore been made, both in this country and in Europe, to successfully utilize straw as a fuel for generating steam in steam boilers; but these attempts have always resulted in failures or partial failures.

When straw is fed into the furnace of an ordinary steam boiler, it burns too quickly to do much good in heating the water in the boiler, until a sufficient quantity of cinders accumulates upon the grate-bars to impede the draft; and unless the cinders are frequently removed from between the grate-bars, they soon accumulate to such an extent as to choke the draft entirely and prevent combustion.

Many devices have been tried and patented for overcoming these troubles; but, as far as I am aware, none of them have succeeded in remedying the difficulties sufficiently to make the straw-burning engine a practical success.

My experiments, however, have developed the fact that, by attaching a tube or box-door to the

the danger from fire in the harvest fields, where those boilers are more especially useful, is entirely obviated; and furnaces of that class of boilers known as return-flue boilers, in which the chimney or stack is constructed directly above the furnace, and the heat and products of combustion from the furnace are carried along under the boiler, and then returned back to the stack through flues or tubes leading through the length of the boiler, the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and the straw will be burned freely, giving out a high degree of heat without danger of choking the grate-bars.

My invention also relates to a novel method of securing the tubes and tube-sheet within the shell of the boiler, so that they can be at any time easily removed for the purpose of cleaning or repairing, and at a much less expense than is ordinarily entailed for such work.

"Referring to the accompanying drawings for a more complete explanation of my invention, Figure 1 is a perspective view *of my boiler from the rear end. Fig.* 2 *is a sectional elevation. Fig.* 3 *is a rear end view with cap removed. Fig.* 4 *is a view of tubes and sheet. Fig.* 5 *is an enlarged view, showing the manner of securing the tube-sheet in the shell.*

exposing the tube-sheet of one end of the boiler. Fig. 2 *is a longitudinal section. Fig.* 3 *is an end view with rear head removed. Fig.* 4 *shows the tube and tube-sheet removed. Fig.* 5 *is an enlarged view showing the rear tube-sheet, flange and ring.*

"A is the shell of my boiler, which is more especially intended to be used for that class of engines employed in

threshing and other field work where there is straw or other light material enough for fuel, but which has never been satisfactorily burned without an artificial draft or blast, and which has always been dangerous by reason of the sparks thrown out on account of incomplete combustion.

"In order to remedy these faults, and perfectly consume all the smoke and sparks, I perforate my tube-sheet B B, so as to admit one large

tube, | *furnace,*

C, near the bottom, which receives the fuel upon the grate, D, and acts at the same time as a tube and fire-box.

To the door of the furnace, C, I attach a straw-feeding tube, E, through which the straw or other light fuel is fed to the furnaces.

Any suitable feeder may be employed to supply straw to the grate, but I have found the device patented by D. Morey, June 20, 1873, *to be very suitable.*

This tube can be constructed in the manner described by David Morey in his patents dated February 11, 1873, *and May* 25, 1873, *for straw-feeding attachment for furnaces, or in some other similar manner for feeding the straw without admitting a draft of air.*

"Above and around the sides of the large

tube, | *furnace,*

C, I place small or locomotive boiler tubes, *e e*, as shown, and these serve to return the heat and the products of combustion to the chimney, F, which is located at the front end of the boiler and communicates with the chamber, H, formed between the flue-sheet and the head or door, G. A similar chamber, H′, is formed at the back end of the boiler, into which the products of combustion pass from the large

tube, | *furnace,*

C, before entering the return-flues, *e*.

"By this construction the light fuel is thoroughly ignited in

its passage through the large tube, which has plenty of air admitted for the purpose. The heat and flame will be concentrated in returning through the small flues, and the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and this latter will not even need a bonnet.

"The tube-sheets B B are made with a flange, *i*, which is turned outward, and these flanges are pierced so as to admit screw-bolts or rivets, *g*, as may be preferred. These bolts secure the tube-sheets in their places perfectly steam and water tight.

"Whenever, by reason of long use, there is a collection of scale or sediment, or if the tubes or the interior of the boiler need repairing, the screw-bolts can be removed, or if rivets are used they can be cut off; when the two tube-sheets, with the tubes, can be removed from the shell in a body, and repairs or cleaning can be easily effected with much less time and trouble than when the boilers are made in the ordinary manner.

"The flange on the rear tube-sheet is turned so much smaller than the interior of the shell that an iron ring, *n*, can be introduced between it and the shell, the bolt passing through it.

"When it is necessary to remove the tubes and sheets, this ring can be taken out after removing the nuts and rivets, and this leaves the rear tube-sheet small enough to pass any rivets or obstructions freely when taking it out.

"By this construction I am enabled to make a boiler and furnace in which straw can be used as a fuel with perfect safety, and in which repairs can be easily effected.

"Having thus described my invention, what I claim and desire to secure by letters-patent is:

1. *The boiler A, having the furnace C, grate D, return-flues or tubes e e, and stack or chimney B, arranged as described, in combination with the straw-feeding furnace-door attachment, substantially as and for the purpose described.*

"2. In a horizontal steam boiler the

large tube | *furnace*

C, formed with a grate D, to serve as a fireplace, in combination with small return-flues, *e e*, when the tubes and tube-sheets are secured by flanges *i* and bolts *g*, so as to be removable from the shell in a body, substantially as and for the purpose described."

It is admitted that there had been no infringement by the defendant of the second claim of the reissued patent, which included that feature of the improvement described, which consisted in the peculiar construction by which the tubes and tube-sheets were secured by flanges and bolts, so as to be removable from the shell in a body. This claim, therefore, is excluded from further consideration in the case.

The patents of David Morey for a straw-feeding attachment, referred to in the specifications in the Rice original and reissued patent, consisted of an original patent, No. 135,659, dated February 11, 1873, reissued as reissue No. 6,420, dated May 4, 1875, and original patent No. 139,075, dated May 20, 1875.

The specifications of the latter describe the invention as relating to "an improved furnace-door attachment, which is especially intended for facilitating the use of straw as a fuel, especially applicable to the removable furnaces of threshing-machine engines; and it consists in attaching to the opening of the furnace, intended for the door, a tube or funnel, having arranged within it a diagonal swinging valve with its lower end turned up into a shoe, whereby the straw can be inserted into the furnace and no sparks allowed to fly out, nor a draft of air allowed to enter." It was also therein declared that the straw was to be fed through the tube by means of an ordinary hay-fork. When the straw is pushed through the tube, the valve or door will be lifted so as to allow the straw to pass through, when it will immediately drop down and cut off the draft of cold air which would otherwise be admitted into the furnace to the detriment of the fire. The claim of the patent was for "the removable tube or funnel, having arranged within

it the diagonal valve with its lower edge turned up, in combination with a furnace, as set forth."

In the reissued Morey patent a revolving partition in the box or attachment is substituted for the diagonal swinging valve, suspended upon and revolving upon journals, and kept in position by means of springs. The office of the partition is to keep the box or tube closed and prevent the entrance of air after the straw has been pushed through the tube; though the specification adds that "it is evident that by leaving the tube or box filled, so as to choke the opening through it, the partition or door can be dispensed with." The straw is introduced into the furnace through the hopper of the box by means of an ordinary hay-fork. The fork-load of straw is placed against the lower end of the partition and pushed through the box, the pressure turning the partition to a horizontal position to admit the hay or straw. As soon as the fork is unloaded and withdrawn, the partition is closed automatically by the springs, thus making a half revolution each time a fork-load of straw is introduced, and immediately closing again, so as to shut off the draft. The claim of the reissued patent embraced, first, "in combination with the furnace of a threshing machine, the detachable box or tube, provided with a flaring mouth, the base of the tube projecting from the furnace at or nearly at a right angle to the front of the furnace, substantially as and for the purpose set forth;" and second, "in combination with the furnace of a threshing engine, the box or tube, provided with a flaring mouth, and having the partition or door, substantially as and for the purpose set forth."

The following is a statement in the language of counsel for the defendant in error of what he claims to be the proof, on the trial of the cause, as contained in the bill of exceptions, showing the state of the art and the history of the inventions attributed to Morey and Rice respectively:

"For many years before the invention, threshing machines had been driven by steam as a motive power. In generating

steam, portable fire-box boilers had been used. Such fire-box boilers were about like the ordinary locomotive boilers in common use. They had a fire-box furnace and a number of tubes or flues passing from one end to the other through the water in the boiler. The fire and products of combustion passed from front to rear through such tubes or flues, and thence out through a smoke-stack placed at the end of the boiler farthest from the furnace.

"Wood or coal was used for fuel with such fire-box boilers. During all this time it had been a great desideratum to substitute straw as fuel in place of wood and coal. In California, in most grain districts, wood and coal were very expensive, and were inconvenient on account of having to be transported to the harvest fields, and from place to place in the fields as the threshing machine was moved from one spot to another, as one section of the field was threshed and another about to be commenced. The transportation of the wood and coal for fuel required teams and men at a time when all were needed in the harvest fields for other purposes. At the same time, where the threshing was done, there was always an accumulation of straw which was of no value, and which the farmers were glad to burn to get it out of the way.

"With the portable engines and boilers then in use, straw could not be successfully used as fuel. Steam could be raised with it while the engine was not working, but when the engine was put to work the steam would run down. In 1872, David Morey attempted to accomplish the desired object by attaching straw-feeding attachments to the fire-box boilers then in use with wood or coal for fuel. He experimented with one in Watsonville, and believed from that experiment that his efforts were successful. He took out two patents early in 1873 for his inventions. * * * He made his experiment in Watsonville in 1872, after the threshing season was over for that year.

"He was anxious to introduce his supposed invention, and desired to exhibit it to the large dealers in agricultural imple-

ments in San Francisco. He accordingly went to San Francisco and looked for a place to try his invention at which it would be convenient for the merchants to attend. Rice had a machine shop at Hayward's, and also had threshing engines which he had for many years used in the harvest fields during the threshing season. He had at his place two portable engines with return-flue boilers and one with a fire-box boiler; one of the engines with return-flue boilers was used for running the machinery in his shop, when not in the field during the threshing season.

"Morey went to Rice and requested the privilege of attaching his straw-feeder to one of Rice's boilers and exhibiting its operation. Rice readily consented and assisted in making the attachment and test. Morey wished to attach the straw-feeder to Rice's fire-box boiler, but Rice insisted on attaching it to the return-flue boiler. It was attached to the return-flue boiler; a test of it was made, and an exhibition given by getting up steam and running the machinery in the shop with it. The test and exhibition gave satisfactory results as far as they went, as Morey's experiment had previously done when made with the same straw-feeder attached to fire-box boiler in Watsonville. *No one learned from the test and exhibition at Hayward's whether there was any advantage in substituting the return-flue boiler for the fire-box boiler or not. Rice was the only man that thought the return-flue boiler was the better for the purpose.*

"Morey then licensed the firm of Treadwell & Co. to make and sell his invention. The exhibitions of Morey had created a belief that straw could be used for fuel in generating steam for running threshing machines, and that very season (1873) many of the heaviest firms in San Francisco, and Morey himself, used and exercised their means and abilities to make the invention practically successful. Hawley & Co. tried it; Baker & Hamilton tried it; Treadwell & Co. tried it, and Morey tried it. *Some of the partners or engineers of each of the said firms had witnessed the exhibition with the return-flue boiler at Hayward's.* Yet each of said firms and Morey himself made all their *sub-*

sequent tests in the season of 1873 *with fire-box boilers, and they all failed.* They all gave up the invention after testing it that season, and believed that their tests and experiments had proved that straw could not be successfully used for fuel in generating steam for running threshing machines. *Not one of them thought for a moment that anything could be gained by substituting the return-flue boiler for the fire-box boiler.* All of them worked and experimented with the fire-box boiler, and when they found it impossible to make that do the work with the straw-feeding attachment, *they believed that they had exhausted the subject by proving that it was impossible to utilize straw for fuel, as desired, by any possible means.* Yet they had all seen or thoroughly understood all that was shown or proved by the test and exhibition with the return-flue boiler at Hayward's in the previous month of March.

"Rice alone believed in the advantages of a return-flue boiler combined with the straw-feeding attachment. Rice alone went into the harvest fields with the return-flue boiler and straw-feeding attachment, and it proved entirely successful. Rice did not know at the time what the other parties were doing, neither were they informed of what Rice was doing. Rice's operations in the threshing season of 1873 were in different sections of the country from where the other parties were experimenting. While all the other parties were by their experiments with fire-box boilers proving that straw could not be utilized for fuel as desired, *Rice alone proved that it could be so utilized*, by substituting the return-flue boiler for the fire-box boiler. Rice was the first and only one that suggested the combination of the return-flue boiler with the straw-feeding attachment, and he was the only one that tested and proved its advantages, and, except for this individual and independent idea and action of Rice, there is no reason for supposing that the great advantages of using straw for fuel in the harvest fields would have been enjoyed to-day."

It further appears from the testimony of Rice that he considered the main principle of his invention to be combining

the arrangement patented by Morey with the return-flue boiler. He supposed at first that his invention covered the boiler itself, though he found afterwards that it was not new, but was, on the contrary, well known as the Cornish boiler. The main difficulty he claimed to overcome by his invention was in preventing air from being admitted when the straw was fed into the furnace. He says, "I took his [*Morey's*] tube and attached it to this boiler [*the return-flue boiler*], and it was a success." The act of invention he specified to consist in "combining the two together."

The contention on the part of the defendant in error is set forth in the language of his counsel in argument as follows:

"Applying the rules of law to the Morey and Rice patents, and (admitting Morey's patents to be valid) the following are the extent and limits of their respective inventions, viz.: Morey discovered that by attaching a straw-feeding tube with a door in it to prevent a draft of air through it, to portable locomotive or fire-box steam boilers, straw could be used with them for fuel more effectively than it could be without such tube. The combination of a straw-feeding tube which would prevent a draft of air through it, with portable steam boilers, was Morey's invention. The discovery that a draft of air must not be admitted between the top of the fire and the bottom of the boiler was his discovery. All of Morey's discoveries and inventions, however, were insufficient to make portable steam boilers adequate to the one great task which it was so desirable for them to perform, viz., that of running threshing machines with only straw for use as fuel.

"Rice began his discoveries and invention where Morey left off. Morey's patents were both issued before Rice had given the subject a thought. Rice discovered that by tearing out the inside of the boiler, which he found in Morey's combination, and by adding to the combination (but inside of the boiler) the large tube *C*, to serve as a furnace and the return flues, that he obtained a combined machine which was a very great improvement over Morey's. Rice's combination

may have and probably did include Morey's combination, but it included more, viz., the large tube or furnace *C* and the return-flues *e e*.

* * * * * * *

"In this case Morey's patents were for combining straw-feeders with portable steam boilers generally. Rice discovered that by substituting one particular kind of portable steam boiler, which no one else had used, for the steam boilers which had been used, that he had a better combination than was ever before made, a combination which did better work than any others, and had within it a new and better mode of operation than any others. It burned all of the straw put in it, while the others would not. It did not choke up with partly burned straw and cinders, while the others would. It caused the heat and flame of the fire to pass twice through the length of the boiler, while in the others the heat and flame passed but once through the length of the boiler.

* * * * * * *

"It is to be noticed that the Morey patents describe and claim only the combination of the straw-feeding device with the *furnace* of a boiler. His patents stop at the furnace-door. They do not go into the boiler beyond the furnace.

"Rice's patent, on the other hand, *begins at the furnace-door, where Morey's stop*, and goes beyond into the boiler, adding new elements."

The bill of exceptions contains fourteen exceptions to as many rulings of the court during the trial, but in argument all the points raised by them were reduced and classified by counsel for plaintiff in error under three heads, as follows:

1. That the reissued letters-patent to Rice, on which the action was founded, were for an invention different from that described in the original, and were therefore void.

2. That the invention described and claimed in the first claim of the plaintiff's reissued patent, which alone was material to the controversy, was anticipated and covered by the letters-patent granted to Morey.

3. That if, after the Morey patents were issued, there was any invention in the combination claimed in the Rice reissued patent, then in fact it is to be attributed to Morey himself, and not to Rice.

I. The first question for our determination is that raised as to the identity of the invention intended to be described in the original and reissued patents to Rice, upon the answer to which the validity of the latter, so far as this suit is concerned, depends.

In cases of reissues of patents inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, it is imperative that the new patent, when issued, shall be for the same invention, and that no new matter shall be introduced into the specification, when, as in the present case, there is a drawing, with reference to which the invention is described. (Rev. Stat., sec. 4916.)

The principles for determining the validity of reissued patents have been discussed and formulated so repeatedly and so recently in this court that it is necessary at present only to refer to the cases of James *v.* Campbell and Miller & Co. *v.* Bridgeport Brass Company, decided at the present term, Burr *v.* Duryee, 1 Wall., 531, and Powder Co. *v.* Powder Works, 98 U. S., 139.

In the present case the question of the identity of the invention in the original and reissued patents is to be determined from their face by mere comparison, notwithstanding what was said in Batten *v.* Taggart, 17 How., 74–85, and consistently with Bischoff *v.* Wethered, 9 Wall., 812, according to the rule laid down in Seymour *v.* Osborne, 11 Wall., 545, and Powder Co. *v.* Powder Works, 98 U. S., 134. That is, if it appears from the face of the instruments that extrinsic evidence is not needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court is able from mere comparison to say what are the inventions described in each, and to affirm from such mere comparison that they are not

the same, but different, then the question of identity is one of pure construction, and not of evidence, and consequently is matter of law for the court, without any auxiliary matter of fact to be passed upon by a jury, if the action be at law.

The question arises in the present record upon an exception of the defendant below to the refusal of the court, after the plaintiff had read in evidence the original patent, to sustain an objection to the introduction in evidence of the reissued letters-patent, on the ground that they were void for want of identity in the invention; and also upon the refusal of the court to instruct the jury, both after the close of the plaintiff's case and after all the evidence was in, to return a verdict for the defendant.

Looking, therefore, to the original patent, nothing can be more clear than that the supposed invention described in it is nothing more or less than the return-flue boiler itself. The patent is for a new and useful improvement in steam boilers. The specification begins by declaring that the invention relates to certain improvements in the construction of steam boilers, whereby the inventor says: "I am enabled to utilize straw and other light substances for fuel, so that a complete combustion of the smoke is attained, and the danger from fire in harvest fields, where these boilers are more especially useful, is entirely obviated." It also relates, as is said, to a novel method of securing the tubes and tube-sheets within the shell of the boiler. Reference is then made to the accompanying drawings for a more complete explanation of the invention. He refers to the shell of the boiler, which he says is more especially intended to be used for that class of engines employed in threshing and other field work where there is straw or other light material enough for fuel, but which has never been satisfactorily burned without an artificial draft or blast, and which has always been dangerous by reason of the sparks thrown out on account of incomplete combustion. It was "in order to remedy these faults and perfectly consume all the smoke and sparks," he continues, that "I perforate my tube-sheets so as

to admit one large tube near the bottom, which receives the fuel upon a grate and acts at the same time as a tube and fire-box." Then occurs this sentence: "Any suitable feeder may be employed to supply straw to the grate, but I have found the device patented by D. Morey June 20, 1873, to be very suitable." He then proceeds with the description of the tubes and the return tubes conducting to the chimney in front, and the communicating chamber between the flue-sheet and the boiler-head, and the similar chamber at the back end of the boiler into which the products of combustion pass from the large flues before entering the return-flues. "By this construction," the specification continues, "the light fuel is thoroughly ignited in its passage through the large tube, which has plenty of air admitted for the purpose. The heat and flame will be concentrated in returning through the small flues, and the combustion will be so complete that no sparks and very little smoke will escape from the chimney, and this little will not even need a bonnet." This is followed by a description of the device for removing the tubes and tube-sheets from the shell in a body for repair or cleaning, which is not material. The inventor then adds: "By this construction I am enabled to make a boiler and furnace in which straw can be used as a fuel with perfect safety, and in which repairs can be easily effected," and concludes: "Having thus described my invention, what I claim and desire to secure by letters-patent is: In a horizontal steam boiler, the large tube, C, formed with a grate, D, to serve as a fire-place, in combination with small return-flues, *e e*, when the tubes and tube-sheets are secured by flanges, *i*, and bolts, *g*, so as to be removable from the shell in a body, substantially as and for the purpose set forth."

The allusion to the mode of supplying straw to the grate is merely casual and incidental. Any suitable feeder may be employed, it is said; the inventor adds: "but I have found the device patented by D. Morey, June 20, 1873, to be very suitable." In what respect this device has been found to be very suitable is not mentioned, nor is it hinted that there are

not many others quite as good. No attempt is made to explain what is needed in a feeder to make it suitable, nor any hint that any of the advantages described as resulting from the operation of the machine depend in any degree upon the character of the feeder. For aught that may be inferred from what is said concerning it, there need be nothing peculiar in the mode of supply, except what is rendered necessary by the character of straw as a fuel in lightness and bulk, and a supposed convenience on that account of supporting it as it is pushed into the furnace. There is certainly no suggestion that is considered important, much less necessary, in supplying this fuel, to do it in such manner and by means of such device as will prevent the introduction of a draft of cold air between the top of the fuel and the bottom of the boiler while in the act of replenishing the supply. Neither the mode of feeding the fuel nor any device for doing it is made any part of the described invention; nor is either referred to in any way as performing any useful or essential function in the operation of the machine described. Every desired advantage which it is expected to accomplish is referred expressly to the boiler itself and its structure and internal arrangement. As is well said by counsel for plaintiff in error on this point: "What he sought was complete *combustion* of the straw by making the products of combustion pass through the boiler twice before they were allowed to escape into the chimney, and the office of the feeder was not auxiliary to the combustion, but preliminary to it. It supplied the straw. It did not burn it. It is true that a Morey tube is shown in the drawing as attached to the front of his engine, but that does not make it part of his invention any more than a set of wheels and axles would have become part of it if the drawing had represented his boiler as mounted on running gear."

If we turn now to the reissued patent, we find that the patentee declares that "my invention relates to the combination of a straw-feeding device, with the furnace door of the class of boilers which are known as return-flue boilers, by which com-

bination I am able to provide a superior arrangement for utilizing straw as a fuel for generating steam." He then refers to the failure of previous attempts to utilize straw as fuel for generating steam, and gives as the reason that "when straw is fed into the furnace of an ordinary steam boiler it burns too quickly to do much good in heating the water in the boiler, until a sufficient quantity of cinders accumulates upon the grate-bars to impede the draft, and unless the cinders are frequently removed from between the grate-bars they soon accumulate to such an extent as to choke the draft entirely and prevent combustion." He then adds that his experiments have developed the fact that by attaching a tube or box door to the furnaces of that class of boilers known as return-flue boilers the combustion will be so complete that no sparks and but very little smoke will escape from the chimney, and the straw will be burned freely, giving out a high degree of heat without danger of choking the grate-bars.

He then gives a description with reference to the drawings, which are the same as those attached to the original specifications. In that description, differing in that respect from the former one, he inserts: "To the door of the furnace, C, I attach a straw-feeding tube, E, through which the straw or other light fuel is fed to the furnaces;" and changes the sentence in reference to the character of the straw-feeder, so as to read as follows: "This tube can be constructed in the manner described by David Morey in his patents dated February 11, 1873, and May 25, 1873, for straw-feeding attachment for furnaces, or in some other suitable manner, *for feeding the straw without admitting a draft of air*." The first claim of the reissued patent reads thus: "The boiler A, having the furnace C, grate D, return-flues or tubes *e e*, and stack or chimney B, arranged as described, *in combination with the straw-feeding furnace-door attachment*, substantially as and for the purpose described."

It appears then from the mere reading of the two specifications that the invention described in the first is for the return-

flue boiler; while that described in the second, abandoning the claim for the boiler itelf, is for a particular mode of using it, with straw as a fuel, by means of an attachment to the furnace-door for that purpose. It might well be that Rice was entitled to patents for both separately, or to one for both inventions. But it is too plain for argument that they are perfectly distinct. A patent consequently originally issued for one cannot lawfully be surrendered as the basis for a reissue for the other. They are as essentially diverse as a patent for a process and one for a compound, as in the case of Powder Co. *v.* Powder Works, 98 U. S., 134, where the reissued patent was avoided, although the original application claimed the invention both of the process and the compound. The case comes directly within the principle held in James *v.* Campbell, *supra*, that a patent for a machine cannot be reissued for the purpose of claiming the process of operating that class of machines, because if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention.

II. The second principal objection to the validity of the Rice reissued patent is that it is anticipated by the Morey patents. We are of opinion that it also is well taken.

Morey's reissued patent of May 4, 1875, covers distinctly and expressly a combination of the furnace of a threshing engine with a detachable box or tube provided with a flaring mouth, the base of the tube projecting from the furnace at or nearly at a right angle to the front of the furnace, the office of which is to furnish means for the supply of straw as fuel to the furnace in such manner as to prevent the entrance of air after the straw has been pushed through the tube, which may be effected, either by means of a movable partition, for which a separate claim is made, or without it, by merely having the tube or box filled, so as to choke the opening through it, with successive supplies of straw.

It applies to every description of threshing engines and boilers, whether fire-box or return-flue. It is true that it does not specify either class, but it embraces both by its lan-

guage, and in its application to both it operates in precisely the same manner and with precisely similar effect. If there is any superiority in the return-flue boilers used with this attachment as a straw-burner, over the fire-box boiler, when used in the same way, the superiority is due not to any difference in the straw-feeding attachment, nor in the mode of its operation, nor to any new feature of the combination, but merely to the superiority of the return-flue boiler itself. And it does not militate against the validity of Morey's patent, or limit the extent and effect of its application, to concede what is claimed, that he was not aware, at the time of his invention, of the superior value of its application to return-flue boilers over fire-box boilers, or that the discovery of that superiority is attributable to Rice. That application of it is within the scope and provision of Morey's invention, whether it had been tested by his experience or was anticipated by his foresight, or not. If, at the date of Morey's invention, return-flue boilers had not been known, but had been subsequently invented, his patent, as applied to them, would still have prevailed against any new claimant; for the new application does not produce any new effect. It is only the occasion which is new; the use itself is merely analogous. The case of Hall's patent, 1 Webst. Pat. Cas., 98, where the flame of gas was used instead of an argand lamp for singeing lace, is pressed upon us as authority for a different conclusion upon this point; but the decision of Lord Abinger in Losh *v.* Hague, 1 Webst. Pat. Cas., 207, and his comments upon the case of Hall's patent, show that it has no application here.

There was no patentable invention in Rice's adaptation. The return-flue boiler, it is admitted, was old. The Morey attachment had been already invented. The idea and principle of its operation, in adapting boilers to the use of straw as a fuel, was the essence of his invention. Rice, it is confessed, discovered nothing more than that for such purposes a return-flue boiler was better than fire-box boilers, which were the only kind that had then been used.

"But this," in the language of Mr. Justice Nelson in Hotchkiss *v.* Greenwood, 11 How., 266, "of itself, can never be the subject of a patent. No one will pretend that a machine made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more." Hicks *v.* Kelsey, 18 Wall., 670, affirms this case.

The same principle was applied in the case of Stow *v.* City of Chicago, decided at the present term.

The case would not be altered if we suppose that at the date of Morey's patent there had been also a valid patent outstanding in a stranger for the return-flue boiler. On that supposition, could it for a moment be contended that Rice could secure for himself a valid patent for the combination as an improvement on both? What invention could he claim? He uses Morey's device precisely as Morey's patent contemplated, and the Cornish boiler exactly as it was designed it should be used; and in the combination each operates separately, producing its own results. There was no inventive resource drawn upon to bring them together. Could not the owners of the patents for the straw-feeding attachment and the return-flue boiler unite their machines and work them together, in defiance of a claim for the combination? To ask the question is to answer it. Yet the case supposed does not differ from the case as it exists, for the public owned the right to the Cornish boiler, and was entitled to every use to which a patentee owning it might lawfully apply it.

On the trial of the cause below Morey's patent seems to have been treated, in the charge of the court, as if it were a patent for a combination of a straw-feeding attachment with the fur-

nace of boilers, other than those with return flues, and that Rice added to the combination the new element of the return flues with a new and important result. But this view, in our opinion, is not justified by the true construction of the patents. If Morey's patent is for a combination, it is a combination of the straw-feeding attachment with all boilers for generating steam, when it is desired to use straw for fuel, and therefore includes the very combination claimed by Rice. And if it is for the straw-feeding attachment as an independent device, but to be used in boilers for generating steam when straw is to be used as fuel, then the application of it to the return-flue boilers, although these were not actually known to the inventor, is merely a new and analogous use of an old device, operating in the very manner intended by its inventor, and the use of which, in the new application, involved no invention, and could not, therefore, be the subject of a patent

III. In fact, it is very apparent from the testimony on the part of the plaintiff below that the actual application of the Morey straw-feeding attachment to the return-flue boiler at Rice's establishment was a demonstration made by Morey himself of the practical operation of his device; intended to show, what he had already proved by previous trials with fire-box boilers to his own satisfaction, that he had invented an arrangement for applying the principle by which straw could be made useful as a fuel for steam boilers, that principle being to prevent the introduction of a draft of cold air while feeding the supply. He showed this to Rice by the trial at the establishment of the latter, on one of his own return-flue boilers. Rice, by subsequent experience, or previous knowledge, it matters not which, perceived the advantages of the return-flue boiler over the fire-box boiler for such a use. That was his sole discovery, and constitutes the basis of the claim for his patent. The marvel is that he should have succeeded in persuading Morey that he had given all its value to the invention of the former, and obtained from him the conveyance of his

patent for a consideration dependent upon the result of this litigation.

The court below, in its rulings upon objections to the introduction of the reissued patent of Rice, in its refusals to charge the jury as requested by the defendant below, and in its charge as given, took views of the validity of the patent, on which the case of the defendant in error rested, opposed to those expressed in this opinion, and which necessarily resulted in the verdict and judgment against the plaintiff in error. For these errors the judgment is reversed and a new trial ordered, and for that purpose the cause is remanded.

REVERSED.

THE UNION PAPER-BAG MACHINE COMPANY, WILLIAM H. CHATFIELD, AND WILLIAM WOODS *v.* MORRIS H. NIXON AND WILLIAM O. ANDERSON; MORRIS H. NIXON AND WILLIAM O. ANDERSON *v.* THE UNION PAPER-BAG MACHINE COMPANY ET AL.; THE UNION PAPER-BAG MACHINE COMPANY, WILLIAM H. CHATFIELD, AND WILLIAM WOODS *v.* THOMAS NIXON; AND THOMAS NIXON *v.* THE UNION PAPER-BAG MACHINE COMPANY, WILLIAM H. CHATFIELD, AND WILLIAM WOODS.

March 6, 1882.

1. A party who purchases from their owner two paper-bag machines of the Morgan patent, under a contract by which the vendor agrees to furnish as many of that kind as the vendee wishes, for a stipulated royalty, and who accepts a machine of the Rice patent sold him by the same vendee in lieu of an additional one of the Morgan patent which he had called for, and continues to use these machines after the Rice patent had been extended and had been assigned to others, is liable to that assignee only for the royalty which he had agreed to pay to his vendee, inasmuch as his vendee had the right to sell the use of the machine for the extended term also, and is not liable for the profits derived from the use of the machine.
2. Inasmuch as such purchaser held the right to use the machines in question by a license older and superior to the assignment, neither the assignee nor licensees claiming under the assignee can recover any damages against such purchaser, but can only recover the royalty which he had agreed to pay.

Opinion of the court.

APPEALS from the Circuit Court of the United States for the Southern District of Ohio.

George Harding, *John R. Bennett*, and *Francis T. Chambers*, for the Union Paper-Bag Machine Co. and Chatfield & Woods.

James Moore and *E. W. Kittredge*, for the Nixons and W. O. Anderson.

WAITE, C. J.—On the 28th of April, 1857, a patent was granted to Charles H. Morgan and Benjamin R. Smith for an invention by Benjamin F. Rice of a "machine for making paper bags." This will hereafter be referred to as the Rice patent. By agreements entered into on the 11th of February and 12th of August, 1859, the owner of this patent executed to Martin Nixon, Thomas Nixon, and William H. Chatfield, partners under the name of Nixon & Chatfield, a license for the exclusive use of the patented machines within certain territory, which included the States of Ohio and Indiana. Thomas Nixon, one of the licensees, is one of the parties to these appeals, and upon the dissolution of the firm of Nixon & Chatfield, in the year 1865, his interest in the license passed to and became vested in Chatfield & Woods. On the 6th of March, 1860, a reissue of this patent was granted to Charles H. Morgan, Leonard Whitney, Jr., and Thurston Priest. Some time about the year 1863, Francis H. Morgan, a brother of Morgan one of the patentees, became the owner of one of the machines covered by this patent, with an unrestricted license for its use. Morgan, the patentee, was for a time a joint owner of the machine with his brother, but he afterwards parted with his interest and Francis H. Morgan became the sole owner. While there is no testimony in the case showing any instrument in writing by which the other patentees united in a license for the use of this machine, we are entirely satisfied that they gave their assent to what was done by Charles H. Morgan, and are in no condition to claim adversely to the license which he undertook to grant.

On the 17th of March, 1863, another patent was issued to Charles H. Morgan for an improvement in paper-bag machines. This will hereafter be referred to as the Morgan patent. Afterwards, Francis H. Morgan became the owner of two machines containing the improvements embraced in this patent, with an unrestricted license for their use. On the 26th of October, 1865, an exclusive license for the use in Philadelphia of machines embraced in both patents was granted to Francis H. Morgan, but there is no testimony showing that his rights in respect to the machines he already owned were confined to that territory, and there is no doubt but that he owned all the machines now in question long before this exclusive license was given.

On the 27th of November, 1865, which was after Thomas Nixon had retired from the firm of Nixon & Chatfield, and transferred all his interest in the exclusive license for the Rice patent to the other partners, Francis H. Morgan sold and conveyed to Thomas Nixon the two Morgan machines which he owned, and agreed to furnish on demand all other machines of like pattern and workmanship which Nixon might want. Nixon on his part bound himself not to use the machines he got in this way except within the States of Ohio and Indiana, and to pay the owner of the patent a royalty of three cents on every thousand bags made. He also agreed not to use any other machines in the manufacture of bags than such as he procured under this contract.

Afterwards, on the 2d of November, 1866, Nixon wanted another machine, and called on Francis H. Morgan to furnish it under his contract. Morgan having none of the Morgan machines on hand at the time, offered his Rice machine in the place of the one called for by the contract. This Nixon agreed to accept if he could be released from his obligation not to use any other than Morgan machines within his territory. Morgan thereupon stipulated accordingly, and Nixon took the machine.

All these things were done by Francis H. Morgan with the

full knowledge and consent of Charles H. Morgan, who was then the sole owner of his own patent and of a half interest in that of Rice. An attempt was made to show the contrary of this, but the testimony leaves no doubt in our minds as to the fact.

Nixon took all the machines he got from Francis H. Morgan to Richmond, Indiana, and, either himself or through others, carried on the manufacture of bags by their use. On the 21st of April, 1871, the Rice patent was extended for seven years from April 28, 1871, on the application of Roxana Rice, the widow and executrix of the inventor. Mrs. Rice assigned the extended patent to the Union Paper-Bag Machine Company, and that company, on the 27th of June, 1871, granted to Chatfield & Woods the exclusive right to use machines constructed under the patent in the States of Ohio and Indiana. At the same time the company granted to the same parties the exclusive right of using within the same territory other machines covered by other patents which it owned, reserving a royalty of four cents on every thousand bags manufactured by any of the machines.

On the 17th of July, 1871, after this assignment, the bag company and Chatfield & Woods sued Thomas Nixon, Morris H. Nixon, and William Anderson, alleged to be doing business as partners under the name of Nixon & Company, to restrain them from using the Rice machine. The defendants answered denying the alleged partnership, and averring that the business was carried on by Morris H. Nixon and William Anderson alone, they using the machine which belonged to Thomas Nixon, and paying him a stipulated rent therefor. The suit was then discontinued as to Thomas Nixon, and from that time it was prosecuted alone against the other defendants. A new suit of similar character was, however, begun against Thomas Nixon, and the two were carried on together. In both the suits answers were filed in effect denying the validity of the patent and the infringement, but on the 31st of May, 1873, decrees was entered in both cases enjoining the defend-

ants from using the machine, and ordering a reference to a master to state an account of profits and damages.

The accounting was continued before the master until the 14th of June, 1876, when Thomas Nixon paid to the bag company the sum of seven thousand five hundred and forty-three dollars, and took a receipt therefor, as follows:

"CINCINNATI, *June* 14, 1876.

"Received of Thomas Nixon the sum of seven thousand five hundred and forty-three dollars (7,543.00), money due under the contract of F. H. Morgan with Thomas Nixon, dated November 27, 1865, and in full for the amount which the said Thomas Nixon reported to be due as royalties under said contract, May 10, 1876.

"7,543.00. "UNION PAPER-BAG MACHINE CO.,

"By EDWIN J. HOWLETT, *Pres.*"

The hearing before the master was continued after this payment was made, and on the 23d of October, 1877, a report was filed, in which the master stated that the period covered by his inquiries was from June 27, 1871, the date of the exclusive license to Chatfield & Woods, to June 9, 1875, the date of the service of the injunction in the case. He also set forth the facts as to the contracts with Francis H. Morgan, and the payment of the royalties thereunder, substantially as they have already been given. He found that the number of bags manufactured by Nixon & Company between the dates above mentioned was 93,500,000, and that the royalty fixed by the bag company for the use of all of its machines was four cents a thousand.

After the report was filed, the defendants in each of the cases asked and obtained leave to put in a supplemental answer, setting up the contract with Francis H. Morgan, and the payment to and acceptance by the bag company of the royalties due thereunder on the 14th of June, 1876. Upon the final hearing, after these answers were in, the court proceeded on the evidence to state the accounts, and decreed that Chatfield & Woods had no right on the pleadings and evi-

dence to any recovery. As to the bag company, it was found that it was the owner of the Rice patent; that it had an established license fee for the use of the several patents for improvements in paper-bag machinery, referred to in its licenses to Chatfield & Woods, and others, of four cents a thousand bags; that this license fee included the use of the Rice machine; that the Francis H. Morgan contract operated as a license to Nixon for the use of the Morgan machines, but not of the Rice machine; that 93,500,000 bags had been manufactured by Nixon & Anderson by the use of all three of the machines; that they had already paid three cents a thousand on their royalty and must now pay one cent a thousand more, amounting in the aggregate to nine hundred and thirty-five dollars, for which a decree was entered against them. From this decree both parties have appealed; the bag company and Chatfield & Woods claiming that the defendants were liable to them not for the license fee, but for the profits they made by the use of the Rice machine, and the defendants that the payment by Thomas Nixon of the royalty reserved under the Francis H. Morgan contract was a full satisfaction of all claims that could be made on them for the use of this machine, as well as those constructed under the Morgan patent.

In the suit against Thomas Nixon the same general conclusions were reached as in that against Morris Nixon and Anderson, but a decree for one cent damages only was rendered against him, because he only rented his machines to others to be used, and did not use them himself. From this decree, also, both parties appealed.

Upon the foregoing facts, the first question that presents itself is whether the use of the Rice machine was included in the royalty fixed by the contract of Francis H. Morgan with Thomas Nixon. If it was, then clearly, so far as the bag company is concerned, the acceptance of the stipulated royalty was a satisfaction of all claims for damages. This was substantially conceded on the argument.

The right of an owner of a patented machine, without any

conditions attached to his ownership, to continue the use of his machine during an extended term of the patent is well settled. (Bloomer *v.* McQuewan, 14 How., 550; Chaffee *v.* Boston Belting Co., 22 How., 223; Mitchell *v.* Hawley, 16 Wall., 547; Adams *v.* Burke, 17 Wall., 445.) Consequently Francis H. Morgan had, by his ownership of the Rice machine, the right to its use during the extended term of the patent. He could also sell it to others to be used in the same way. Power to sell the machine and transfer the accompanying right of use is an incident of unrestricted ownership. The contract of Morgan was to furnish Thomas Nixon with all the Morgan machines he wanted to use in the designated territory at the stipulated price and royalty. When called upon to furnish one of these machines under the contract, he persuaded Nixon to take the Rice machine instead. Under these circumstances there cannot be a doubt that it was the intention of the parties to put the Rice machine in the place of a Morgan machine under the contract, and that whatever compensation was to be paid to the patentee for the use of the Morgan machine must be paid for the use of the Rice machine. It follows that, so far as the bag company is concerned, there should have been no decree against Nixon & Anderson. The payment of the royalty in June, 1876, was in full for the use of the Rice machine as well as the Morgan machines.

Next, as to Chatfield & Woods. Their exclusive right to the use of the Rice machine continued no longer than the term of the original patent. (Wilson *v.* Rousseau, 4 How., 646.) The bag company does not appear ever to have had any interest in the patent before the extension. Chatfield & Woods have never been anything else than licensees. As such they could not sue for an infringement. All their rights must be enforced through or in the name of the patentee. (Littlefield *v.* Perry, 21 Wall., 223.) Their recovery in this case, therefore, must be limited to their rights under the license from the bag company. Such was the understanding of the master, for he distinctly states in his report that his

inquiries were confined to the period between the date of this license and the service of the injunction which stopped all further use of the machines.

Whatever may have been the effect of the first exclusive license held by Chatfield & Woods upon the right of Nixon to use his Rice machine in Indiana before the end of the original term of the patent, as that license ceased when the term expired, it necessarily follows that during the extended term no questions can arise under that license. After the extended term began, that license did not stand in the way of the use by Nixon of his machine wherever he pleased, and the bag company took its title subject to his rights as an unrestricted owner, save in respect to royalties, of one of the patented machines. Chatfield & Woods took their license subject to the same rights in Nixon. They cannot claim as against Nixon more than the company could convey, and as Nixon was in legal effect operating his machine under a valid license superior to theirs, it follows that in this suit there can be no recovery in their behalf. Their remedy, if they have any, is against the company on their contract for the license, or to secure the benefit of the royalty.

From what has thus been said it appears that the decree in the suit against Nixon & Anderson, as far as it requires the payment of damages, was wrong. As the payment of the royalty was not made until long after the interlocutory decree sustaining the validity of the patent, and the supplementary answer setting up the special defense was not filed until after the report of the master was in, it was right to charge the costs against them.

So far as the appeal of Thomas Nixon is concerned, the controversy is really as to costs alone. The decree against him will consequently not be considered. (Canter *v.* American and Ocean Ins. Co., 3 Pet., 307; Elastic Fabric Co. *v.* Smith, 100 U. S., 110.)

The decree in the case against Nixon & Anderson is reversed, with costs, and the cause remanded with instructions

to enter a decree against the defendants for one dollar only and costs of suit. That in the suit against Thomas Nixon alone is affirmed, each party to pay the costs of his own appeal.

PART AFFIRMED AND PART REVERSED.

Mr. Justice MATTHEWS having been of counsel in the court below, took no part in this decision.

W. H. CHATFIELD, WILLIAM WOODS, THE POWERS PAPER COMPANY, AND OTHERS, v. W. F. BOYLE, JEFFERSON DAVIS, AND OTHERS.

March 6, 1882.

Where certain creditors secured by assignment bring a suit on behalf of all creditors secured thereby to set aside a prior assignment, and, on an adverse decision, appeal, the matter in dispute as regards them is simply their proportionate share of the fund that would be realized in the event of success, and not the entire fund; nor can any portion of the fund that would go to creditors not before the court be taken into account.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

William M. Ramsey, for appellants.

J. D. McPherson and *J. W. Clapp*, for appellees.

WAITE, C. J.—Boyle & Co., a mercantile firm doing business at Memphis, Tenn., being insolvent, on the 17th of November, 1876, made a general assignment for the benefit of all their creditors to J. A. Omberg. Before this assignment a deed of trust, in the nature of a mortgage, had been made conveying some of the property of the firm as security for a debt said to be owing to Jefferson Davis. The total indebtedness of the firm at the time of this assignment, to creditors other than Davis and another person who has since been paid

out of securities he held at the time, was $17,233.63; the debt claimed to be due Davis was $25,000.00, making a total of $42,233.63.

Chatfield and Woods, creditors of the firm to the amount of $3,440.37, filed a bill in equity in one of the State courts of Tennessee, on the 13th of January, 1877, against Boyle, Davis, and others, the object of which was to set aside the deed of trust in favor of Davis, and also to prevent Davis from participating in the benefits of the general assignment, on the ground that he was not in reality a creditor of the firm, but one of the partners. This suit was brought, as alleged, in aid of the assignment and in behalf of all the creditors of the firm who might be entitled to come and join therein. Omberg, the assignee, was also joined as a complainant. As to him, the allegations in the bill are as follows: "Complainant J. A. Omberg, as the assignee in said deed of assignment, comes at the request of the creditors as aforesaid, and claims the benefit of all the matters and circumstances in this bill set up in behalf of all the creditors of Boyle & Co., and especially in behalf of all those creditors who may be hereafter made parties hereto, and may by proper averments and proof make good their claim to be paid out of the proceeds of the property hereby proceeded against, and asks for them and each of them all the relief, under and by virtue and in aid of said assignment, to which they or either or each of them may as creditors be entitled as against defendant Davis or other defendants."

During the pendency of the suit in the State court the property held under the trust for the benefit of Davis was sold with the consent of all parties and realized $2,951.10, which is now in court subject to any decree that may be finally rendered. The assignee has also disposed of all the remaining property embraced in the assignment, and in the distribution that has been made of the proceeds, $3.403.81 was set apart for Davis, if he shall be adjudged to be a creditor of the firm and not a partner. These two sums, amounting in the aggregate to

$6,354.91, constitute the entire fund about which the dispute in the case arises.

On the 16th of March, 1877, the Powers Paper Company, Edwin Hoole, and L. Snider & Sons, also creditors of the firm, were, on their own petition, admitted as parties complainant. Their claims were respectively as follows: Powers Paper Company, $2,689.60; Edward Hoole, $1,232.61; L. Snider & Sons, $1,103.76.

On the 23d of March, 1877, the following order was entered in the suit: "In this cause it appearing to the court by a statement of J. A. Omberg that all the creditors who have demanded of James A. Omberg, the assignée, to join in this litigation, have come in and had themselves made parties therein, it is, therefore, on motion, ordered that this bill be dismissed, so far as said Omberg is concerned, and he go hence without day."

On the next day, March 24, S. A. Tower & Co. and H. B. Graham & Brothers were, on their petition, made parties. Their claims are as follows: S. A. Tower & Co., $887.68; H. B. Graham & Brothers, $318.41.

No other parties have ever appeared to claim the benefit of the suit. The aggregate of all the several claims represented by all the complainants is $9,672.43.

On the 4th of April, 1877, after Omberg had been dismissed from the case, the remaining complainants united in a petition for the removal of the suit to the Circuit Court of the United States for the Western District of Tennessee, which was afterwards effected. Answers were filed and testimony taken in the Circuit Court. Upon final hearing the bill was dismissed. From the decree to that effect all the complainants united in this appeal. The appellees now move to dismiss because the matter in dispute does not exceed the sum of five thousand dollars. In support of this motion two grounds are relied on. They are:

1. That the claims of the several complainants are separate and distinct, and cannot be united for the purpose of making

up the amount necessary to give us jurisdiction. The effort in this connection is to bring the case within the operation of the principle under which motions to dismiss were granted in Seaver *v.* Bigelow, 5 Wallace, 208; Rich *v.* Lambert, 12 Howard, 347; Oliver *v.* Alexander, 6 Pet., 143; Stratton *v.* Jarvis, 8 Id., 4, and Paving Co. *v.* Mulford, 100 U. S., 148.

2. That the matter in dispute is not the whole amount of the fund in court which is claimed by Davis, but only so much as would be distributable to the complainants under the assignment, if Davis is adjudged to be a partner and not a creditor. For this, Terry *v.* Hatch, 93 U. S., 44, is relied on.

Without considering the first of these propositions, we think it clear the case comes within the last. These appellants on this appeal represent no one but themselves. Their rights here are just what Omberg asked for himself, that is to say, such as belong to creditors who in this suit make good their claim to be paid under the assignment out of the fund proceeded against. The complainants do not necessarily represent all the creditors entitled to the benefits of the assignment, neither have they assumed anything of the kind. They ask only for such relief as belongs to those who actually come in according to their invitation. They are in no situation to appropriate to themselves the whole of the fund. The other creditors may certainly abandon their interest and permit it to go to Davis if they choose. The complainants cannot compel them to take it whether they want it or not. By not coming into the suit they, in effect, have elected not to contend with Davis for their share, and to treat him as a creditor rather than a partner. When Omberg went out of the suit all the creditors had come in who wanted him to proceed. Under these circumstances, if the bill had been sustained, no opportunity need have been given other creditors to come in. The court might very properly have said that as they had stayed out until all risks of liability for costs and expenses were gone, they should not then be admitted. Such being the case, a decree would have been entered in favor of the complainants

for their distributive shares of the fund, and no more. The rest would have remained for Davis, the same as though no suit had been begun. The fund is $6,354.91, and the debts entitled to the benefit of the assignment $17,233.63, of which the complainants represent only $9,672.43. Under this state of facts the whole of the distributive shares of the complainants, if they are successful, will be less than five thousand dollars, not enough to give us jurisdiction. Upon an appeal we will not consider whether others may come in if we reverse the decree. We look only to the parties who are actually before us. The case is, therefore, within the rule stated in Terry *v.* Hatch, and the motion to dismiss is granted.

DISMISSED.

Mr. Justice MATTHEWS having been of counsel in the court below, took no part in this decision.

JOHN J. STEWART *v.* THE TOWN OF LANSING.

March 6, 1882.

1. Where a county judge made an order for the issue of certain bonds, assuming to act under a State law, and on appeal by the tax-payers this order was reversed, such judgment, between the original parties to the bonds, was equivalent to a refusal to make the original order, and the bonds issued under it are invalid as between such parties.
2. A judgment that a party is a *bona-fide* owner of certain coupons does not establish that he is the *bona-fide* owner of the bonds.
3. The plaintiff held on the facts not to have proved that he was a *bona-fide* holder of certain bonds.
4. It is not error in a court to instruct a jury to find a certain verdict if it is satisfied that, conceding all the inferences which a jury might draw from the testimony, the evidence would not be sufficient to support a contrary verdict.

ERROR to the Circuit Court of the United States for the Northern District of New York.

James R. Cox, for plaintiff in error.

Francis Kernan, for defendant in error.

Opinion of the court.

WAITE, C. J.—This was a suit against the town of Lansing to recover for interest coupons due July 1, 1872, January 1, 1873, January 1, 1874, July 1, 1874, January 1, 1875, July 1, 1875, January 1, 1876, and July 1, 1876, attached to seventy-five bonds of one thousand dollars each, purporting to have been issued by the town under the authority of a statute of New York, passed May 18, 1869, to permit municipal corporations to aid in the construction of railroads. The defense stated generally was that the bonds had been issued without authority of law. At the trial, after the testimony on both sides was in, the court instructed the jury to find a verdict for the defendant, which was done, and judgment entered accordingly. This ruling furnishes the principal ground of error assigned here.

The testimony is all set out in the bill of exceptions, and the undisputed facts are these:

On the 21st of March, 1871, the county judge of Tompkins county, within which the town of Lansing is situated, assuming to act under the authority of the law of 1869, rendered a judgment appointing commissioners to execute bonds of the town to the amount of seventy-five thousand dollars and invest them in the capital stock of the Cayuga Lake Railroad Company. On the 27th of the same month, at the instance of the opposing tax-payers of the town, a writ of certiorari directed to the county judge was issued from the Supreme Court of the State for a review of this judgment. This writ was served on the judge at or about its date, and on the first of September he made his return thereto, sending up, as required by law, a transcript of the record of the proceedings before him which were brought under review. Of this writ and what was done thereunder, both the commissioners appointed by the judge and the railroad company had full notice; but the commissioners, on or about the 14th of October, 1871, executed the bonds which had been authorized, payable to bearer on the 1st day of January, 1902, with coupons for semi-annual instalments of interest attached, and delivered them to the company in exchange for seven hundred and fifty shares of its capital

stock. At the same time the commissioners took from the company a bond of indemnity to save them harmless from all costs, liabilities, or expenses on account of what had been done.

The bonds, as soon as delivered, were taken by the company to New York, and there pledged as collateral security for money borrowed. On the 27th of May, 1872, the Supreme Court in general term reversed, and in all things held for naught, the judgment of the county judge appointing commissioners and authorizing the issue of the bonds. This judgment of the Supreme Court still remains in force.

On the 26th of November, 1872, the company arranged with Elliott, Collins & Co., a banking firm in Philadelphia, for the money to take up the bonds in New York, and they again pledged the bonds to that firm as security for the advances made. On the 8th of February, 1873, this debt to Elliott, Collins & Co. was paid, and they parted with the bonds. The entire testimony as to what took place at this time is as follows:

William Elliott, the senior member of the firm, examined as a witness, said: "We did not sell the bonds at all. The bonds, on the 8th of February, 1873, we parted with. The cash we received on parting with them was $54,337.50. I have never seen any of the bonds since. The loan negotiated by us was paid in this way. Up to this time the loan had not been paid. It was paid by this money."

On cross-examination he said: "I cannot tell through whom personally we received the bonds. Think we received them by express. They were negotiated by Mr. Delafield, either personally or by letter. All our transactions with that company have been done through Mr. Delafield. * * * * I am not acquainted with John J. Stewart, the plaintiff in this action. I do not know where he lives, or in what State he lives. Neither myself nor my banking firm ever had any transactions with him to my knowledge." This testimony was taken in behalf of the plaintiff, by deposition, on the 18th of July, 1876.

Afterwards, on the 18th of August in the same year, another

deposition of the same witness was taken in behalf of the plaintiff. In this deposition, looking at Exhibit D, which was as follows: "PHILADELPHIA, *February* 8, 1873.

"Cayuga Lake R. R. Co.

75,000 Town of Lansing bonds.....	$54,337 50
Notes March 29, $50,000; 49 days' int., $408.33...	49,591 67
Credit Cayuga Lake	$4,745 83"

he said: "This is a statement of the sale of said town of Lansing bonds by the firm of Elliott, Collins & Co. The sale was made at the time it bears date, February 8, 1873; it was made out and sent to the Cayuga Lake Railroad Company at that date. I said in my previous examination that we did not sell the bonds in question. I intended by that to say that we did not make the negotiation for the sale of them, but they passed through our hands on terms which were agreed on by others. The price at which they were sold we were consulted about, and our advice asked. We received the money and delivered the bonds on that day." On cross-examination he said: "I do not wish to change but merely explain my testimony given at the previous examination. Exhibit D is in the handwriting of my son, who generally makes out the accounts, Adolphus William Elliott. He is still living in this city. To my present recollection, the first time I saw Exhibit D is to-day. I have no recollection of ever having seen it before. The statement first credits the Cayuga Lake Railroad Company with $54,337.50, under date of February 8, 1873, that being the avails of the bonds. * * * It was sent to the Cayuga Lake Railroad Company at the time, as I have stated before. I have no personal knowledge of Mr. Stewart; I mean the Mr. Stewart who is plaintiff in this action. I have no personal knowledge of any business transaction whatever between myself or my house and Mr. Stewart. I have no personal knowledge whether these bonds ever passed into the hands of Mr. Stewart, the plaintiff in this action, nor whether he ever paid anything for them. Somebody paid for them, and we got the money."

Talmadge Delafield, the treasurer of the company, a witness called on the part of the plaintiff, testified that Elliott, Collins & Co. held the bonds after the transfer to them until February 8, 1873, when they rendered an account of the sale. On cross-examination he said "he had no personal knowledge of the sale of the bonds. Never saw Mr. Stewart; don't know that there is such a man. I have never corresponded with him, nor he with me. Whatever occurred between them and him was entirely without my knowledge."

On the 30th of May, 1874, a suit was brought in the name of Stewart, the present plaintiff in error, in the Circuit Court of the United States for the Northern District of New York, to recover the coupons due July 1, 1873, averring his ownership thereof.

On the 20th of July, 1872, Manassah Bailey brought suit in the same court to recover the coupons of July 1, 1872. In each of the suits the defenses were that the bonds and coupons were issued without the authority of law, and that the plaintiffs respectively were not *bona-fide* holders. The suits were tried together and upon the same evidence so far as applicable. In both cases it was decided that the bonds were invalid, and in that of Bailey judgment was given for the defendant because it had not been satisfactorily shown that he was a *bona-fide* holder. In the Stewart case, however, the court used this language in its opinion: "The suit of Stewart differs from the one by Bailey in that it appears that the bonds were pledged as collateral in February, 1873, to Elliott, Collins & Co., of Philadelphia, and sold by them after consultation with the officers of the railroad company. Elliott, Collins & Co. were holders for value before maturity, and their sale to satisfy the pledge conveyed their title to the purchaser. Whether the plaintiff was the purchaser from them directly or not is not clear; but, however this may be, he succeeds to all the rights of Elliott, Collins & Co., and occupies the position of a *bona-fide* purchaser. As against a *bona-fide* holder of the coupons, none

of the defenses interposed are tenable." Acting on this principle, the court gave judgment in favor of Stewart for the coupons he held.

Upon the trial of the present action, the record of the first Stewart judgment was given in evidence, and the counsel for the plaintiff, who had also been counsel for Stewart and Bailey in the former suits, was examined as a witness. He testified that after the judgment against Bailey he gave the coupons sued for in that action to a Mr. Tryon, in New York. He was unable to say from whom he got them back, nor when. Neither did he tell from whom he got the bonds and coupons which were used in evidence at the present trial.

As between the railroad company and the town, the judgment of the Supreme Court reversing and annulling the order of the county judge invalidated the bonds. If the bonds had not been delivered before, they could not have been afterwards. The judgment of reversal was equivalent between these parties to a refusal by the county judge to make the original order.

The next inquiry is whether, on the evidence, Stewart occupied in this suit a better position than the town. That depends on whether the testimony was such as to make it the duty of the court to submit to the jury under proper instructions the determination of the question whether he was in a commercial sense the *bona-fide* holder of the coupons sued for.

It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is actually a *bona-fide* holder of the paper. The mere possession of the paper under such circumstances is not enough. (Smith *v.* Sac Co., 11 Wallace, 147.)

Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona-fide* holder before he could recover. This, it is contended, was conclusively established by the judgment in the suit on the coupons of July, 1873. The

issue in that case was as to the ownership of those coupons, not of the bonds. That did not necessarily involve an ownership of the bonds. We have often held that coupons detached from bonds are negotiable instruments, and capable of separate ownership and transfer. (Clark *v.* Iowa City, 20 Wall., 589.) While the court in its opinion, when rendering the former judgment, used language broad enough to cover the bonds, this language must be confined in its effect to the issues on trial, that is to say, the ownership of the coupons alone. In Cromwell *v.* County of Sac, 94 U. S., 351, it was distinctly held that a determination in one action that a plaintiff was not an owner for value of certain coupons sued on, did not estop him from proving in another action that he was such an owner of other coupons detached from the bonds. The proposition in this case is but the converse of that.

This makes it necessary to inquire whether upon the testimony the burden of establishing a *bona-fide* ownership was so far overcome at the trial as to make it improper for the court to take that question from the jury. The testimony is noticeable rather for what is omitted than for what was introduced. It would seem to have been easy to prove the exact facts as to the "parting with" the bonds by Elliott, Collins & Co. Although the bonds had been pledged in New York before, Elliott, Collins & Co. took them from the company, not from the New York holders. The company negotiated the loan from them, and on taking up the bonds in New York made a new pledge. This was all done after the judgment of the Supreme Court upon the certiorari. In the former suit a judgment had been secured only by proving a *bona-fide* ownership in the plaintiff. Notice of the necessity of establishing the same fact in this case was, therefore, given the plaintiff and his counsel. Acting on this notice, the same counsel who appeared in the former case went to Philadelphia to get the necessary testimony. He called on the senior member of the firm of Elliott, Collins & Co. and took his deposition. In this deposition it was clearly shown that although that firm

had "parted with" the bonds, and got some money when they did so, which was put to the credit of the company, they did not sell the bonds. That was done, if done at all, by some one else. Not satisfied with this testimony, the same counsel went again to Philadelphia to make another effort. He took with him a paper he had found in the handwriting of the junior member of the firm, now known as Exhibit D. Instead of examining the junior partner, he went again to the senior partner, who evidently knew but little personally about the transaction, and stopped with him, although it appears that the witness who made out the exhibit was then in the city, and it was again stated that the sale was not negotiated by the firm, but that the bonds only passed through their hands under terms which had been agreed on by others. Who those others were is not stated. Neither the actual purchaser nor his representative in the negotiation was named. Stewart, the plaintiff, was not known to any of the witnesses examined. No one had ever seen him. His counsel, though examined as a witness, gave no information in respect to him, and was also unable to tell from whom the Bailey coupons were received. It is by no means certain from the testimony whether such a man as the plaintiff is actually in existence. Even the witness Elliott was not asked whether he knew of the decision of the Supreme Court when his firm took the bonds. The sale, if actually made, was at an enormous discount. Although the Bailey coupons are included in this suit, another action for their recovery was pending at the time Elliott, Collins & Co. parted with the bonds, in which the same defenses now relied on were set up. The counsel now appearing for the present plaintiff was also the counsel for Bailey in that action, and for the railroad company when the bonds were got from the commissioners. It would have been apparently so easy to make the necessary proof, if it could have safely been done, that we are unable to account for its absence, except on the theory that a disclosure of the whole truth would be fatal to a recovery. While it would not, perhaps, have

been improper for the court, in the exercise of its rightful discretion, to leave the case to the jury on the evidence, we cannot say it was error not to do so. In Pleasants *v.* Fant, 22 Wall., 122, it was held that "if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant" a particular verdict, the jury might be so instructed. (R. R. Co. *v.* Fraloff, 100 U. S., 26; Oscanyon *v.* Arms Co., 103 U. S., 26.) This case, in our opinion, comes under that rule.

The record in the Bailey suit was certainly admissible in evidence upon the issue as to the *bona-fide* ownership of the coupons of July, 1872.

Without, therefore, considering any of the other questions presented for our consideration on the argument, the judgment is affirmed.

AFFIRMED.

BASIL F. WARNOCK, ADMINISTRATOR OF THE ESTATE OF HENRY L. CROSSER, DECEASED, v. GEO. DAVIS AND OTHERS, COMPOSING THE SCIOTO TRUST ASSOCIATION OF PORTSMOUTH, OHIO.

March 6, 1882.

1. An insurable interest in the life of another is such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.
2. An insurance policy on the life of another by one not having such an interest, is a wager policy and void.
3. An assignment of a policy to a party not having an insurable interest, whether of the whole or a portion merely of the insurance-money, is valid only to the extent of loans or advances made on account of it, or the premiums paid on its security; but as far as it attempts to assign any surplus, is as void as a direct insurance would be, and is equally objectionable as a wager policy.

Statement of the case.

4. If under color of such assignment the assignee collects the money due on such a policy, the assignor or his representatives may recover the amount so collected, less any loans or advances, and the rule of *par delictum* does not apply to such a case.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The plaintiff is the administrator of the estate of Henry L. Crosser, deceased, and a resident of Kentucky. The defendants are partners under the name of the Scioto Trust Association of Portsmouth, Ohio, and residents of that State. On the 27th of February, 1872, Crosser applied to the Protection Life Insurance Company of Chicago, a corporation created under the laws of Illinois, for a policy on his life to the amount of five thousand dollars; and on the same day entered into the following agreement with the Scioto Trust Association:

"This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at town of Springville, county of Greenup, State of Kentucky, and the Scioto Trust Association of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life Insurance Company of Chicago, Illinois, for policy on his life, limited to the amount of $5,000.00, hereby agrees to and with the said Scioto Trust Association that nine-tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of and be paid by the said Protection Life Insurance Company to said Scioto Trust Association, and shall by said party of the first part be assigned and transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy; that the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title and in-

terest whatever in and to said policy, and the moneys due and payable thereon at the time of his death, save and except the one-tenth part of such moneys being subject to his disposition as aforesaid; also to keep the Scioto Trust Association constantly informed concerning his residence, post-office address, and removals; and further, that said party of the first part shall pay to the said Scioto Trust Association a fee of $6.00 in hand on the execution and delivery of this agreement, and annual dues of $2.50 to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one-tenth part.

"In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues and assessments, and to procure the payment of one-tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

"It is hereby expressly understood and agreed by and between the parties hereto that said Scioto Trust Association do not not in any manner obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

"Witness our hands this 27th day of February, A. D. 1872.

"HENRY L. CROSSER.

"THE SCIOTO TRUST ASSOCIATION,

"By A. MCFARLAND, *President*,

"GEORGE DAVIS, *Treasurer*."

Statement of the case.

On the following day, February 28, 1872, Crosser executed to the association the following assignment:

"In consideration of the terms and stipulations of a certain agreement concluded by and between the undersigned and the Scioto Trust Association of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign to said Scioto Trust Association all my right, title, and interest in and to the within life insurance policy No. 3,247, issued to me by the Protection Life Insurance Company of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one-tenth part of the same, which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or in case of her death, to such person or persons as the law may direct. And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorney, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association, to wit, nine-tenths thereof, and to pay the balance, one-tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom, as above directed and stipulated, the amount, if any, due from me at the time of my death to said Scioto Trust Association for fees and dues.

"Witness my hand and seal this 28th day of February, A. D. 1872.

"HENRY L. CROSSER." [SEAL.]

Crosser died on the 11th of September, 1873, and on the 16th of May, 1874, the trust association collected from the insurance company the amount of the policy, namely, $5,000, one-tenth of which ($500), less certain sums due under the agreement, was paid to the widow of the deceased.

The present action is brought to recover the balance, which

with interest exceeds five thousand dollars. The defendants admit the collection of the money from the insurance company; but, to defeat the action, rely upon the agreement mentioned and the assignment of the policy stipulated in it. The agreement and assignment are specifically mentioned in the second and third of the three defenses set up in their answer. The first defense consists in a general allegation that nine-tenths of the policy was assigned by the deceased to the defendants in good faith and for a valuable consideration, and that a power of attorney was executed to them at the time to collect the remaining one-tenth and pay the same over to the widow of the deceased; and that after the collection of the amount they had paid the one-tenth to her, and taken her receipt for it.

The case was tried by the court without the intervention of a jury. On the trial the plaintiff gave in evidence the deposition of the receiver of the insurance company, who produced from the papers in his custody the policy of insurance, the agreement and assignment mentioned, the proofs presented to the company of the death of the insured, and the receipt by the trust association of the insurance-money. There was no other testimony offered. The court thereupon found for the defendants, to which finding the plaintiff excepted. Judgment being entered thereon in their favor, the case is brought to this court for review.

F. B. Foraker, for plaintiff in error.

A. C. Thompson, for defendants in error.

FIELD, J.—As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defense. All the facts established by it are admitted in the other defenses. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that

the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the trust association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event.

They are, therefore, independently of any statute on the subject, condemned as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance-money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance-money.

The question here presented has arisen under somewhat different circumstances in several of the State courts, and there is a conflict in their decisions. In the Franklin Life Insurance Company *v.* Hazzard, which arose in Indiana, the policy of insurance, which was for $3,000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured declaring that he had concluded not to keep up the policy, sold it for twenty dollars to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." (41 Black, p. 121.) The court referred with approval to a decision of the same purport by the

Supreme Court of Massachusetts, in Stevens *v.* Warren, 101 Mass., 564. There the question presented was whether the assignment of a policy by the assured in his life-time, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not, holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and after remarking that the contract in such a case might be sustained, said "that the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the trust association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to

advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum, payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. (St. John *v.* The American Mutual Life Insurance Company, 13 New York, 31; Valton *v.* The National Loan Fund Life Assurance Company, 20 New York, 32.) In the opinion in the first case the court cite Ashley *v.* Ashley, 3 Simons, 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in Cammack *v.* Lewis, 15 Wall., 643. There a policy of life insurance for $3,000, procured by a debtor at the suggestion of a creditor to whom he owed $70, was assigned to the latter to

secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company, and paid to the widow $950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it, and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will therefore be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow and the several sums advanced by the defendant; and it is so ordered.

REVERSED.

RALLS COUNTY v. JOSEPH M. DOUGLASS.

March 6, 1882.

1. County bonds issued in Missouri by a *de facto* County Court, sealed with the seal of the court and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.
2. It cannot be set up as a defense to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter.
3. Bonds issued by counties in Missouri in 1870 and 1871 in payment of

subscriptions to railroad stock, without a vote of the people, are valid if the subscription was made under authority of charters granted in 1857, which did not require such vote, the State Constitution of 1865 having been construed at the time of the issue of such bonds not to be retroactive.

4. County bonds and coupons issued in 1870 and 1871 in payment of subscriptions to railroad companies were not required to be stamped by the United States internal revenue laws in force at the time of their issue, being exempt from taxation as official instruments issued by the officers of any State, county, town, or other municipal corporation.
5. The execution of the bonds not being denied under oath, it was not necessary, according to Missouri practice, to prove the order of the County Court authorizing their execution.
6. *Bona-fide* ownership of the coupons sued on being denied, it was not only proper but necessary to prove it.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

H. A. Cunningham, for plaintiff in error.

John H. Overall, for defendant in error.

WAITE, C. J.—If we understand correctly the questions presented in this case, they are—

1. Whether if county bonds are issued in Missouri by a *de facto* County Court, and are sealed with the seal of the court and signed by the *de facto* president, they can be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court.

2. Whether it can be shown as a defense to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter.

3. Whether bonds issued by counties in Missouri during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are invalid if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken.

4. Whether county bonds and coupons issued in the years 1870 and 1871, in payment of subscriptions to railroad companies, were admissible in evidence on the trial of an action against the county for the recovery of the amount due thereon, if not stamped as obligations for the payment of money under the provisions of the internal revenue laws of the United States in force at the time of their issue.

5. Whether in this suit it was necessary to prove the order of the County Court authorizing the president of the court to sign and the agent to countersign the bonds, there being no plea or answer sworn to denying the execution of the bonds or coupons sued on.

6. Whether testimony was admissible to prove that the plaintiff was a *bona-fide* holder and owner of the coupons sued on, there being no averment in the petition to that effect.

There are other questions presented by the assignments of error, but they are not alluded to in the argument, and we do not deem them of sufficient importance to require attention.

1. As to the competency of the court.

In no State is it more authoritatively settled than in Missouri that "the acts of an officer *de facto* (although his title may be bad) are valid so far as they concern the public, or the rights of third persons who have an interest in the things done." In State *v.* Douglass, 50 Mo., 596, the Supreme Court of that State said: "Without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right *de jure* was established." To the same effect is Harbaugh *v.* Winsor, 38 Mo., 327. This is conclusive. The question here is not whether Dimmick was *de jure* probate judge of Ralls county, but whether he was acting under color of right as a justice and president of the County Court. That is averred in the petition and not denied in the answer.

His right to the office is one thing; his action while exercising the duties of the office another.

2. As to the organization of the company.

Both this court and the Supreme Court of Missouri have held over and over again that such a defense as was here set up cannot be maintained. (Bank of Missouri *v.* Merchants' Bank, 10 Mo., 130; Kayser *v.* Trustees of Bremen, 16 Id., 90; Smith *v.* County of Clark, 54 Id., 81; City of St. Louis *v.* Shields, 62 Mo., 247; County of Macon *v.* Shores, 97 U. S., 277.)

3. As to the vote of the people.

The Supreme Court of Missouri has many times decided, and this court, following such decisions, has always held, that the provision in the State Constitution of 1865, article 11, section 14, prohibiting a county from becoming a stockholder in or loaning its credit to a corporation without a vote of the people, was intended as a limitation on future legislation only, and did not operate to repeal enabling acts in existence when the Constitution took effect. (State *v.* Macon County, 41 Mo., 453; Kansas City, &c., R. R. Co. *v.* Justices Nodaway County Court, 47 Id., 349; State *v.* County Court of Sullivan County, 51 Id., 531, decided in 1873, in which it was said, "It has always been held that the provision of the Constitution, article 11, section 14, was a limitation upon the future power of the Legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted;" State *v.* Greene County, 54 Id., 550; County of Callaway *v.* Foster, 93 U. S., 570; County of Scotland *v.* Thomas, 94 Id., 688; County of Henry *v.* Nicolay, 95 Id., 624; County of Cass *v.* Gillett, 100 Id., 592.) When all these cases were decided the act of March 23, 1861, was in force, which provided that it should not be lawful for counties to subscribe to the stock of railroad companies until an election had been held under the provisions of that act; yet it seems never to have been specially referred to, either by counsel or the court, except once in Smith *v.* Clarke County, 54 Mo., 70, when Napton, J., said: "So that the provisions of the revised

code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of the prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as their reports show, not to effect the repeal of the privileges contained in special charters."

Such being the condition of the law on this subject down to April, 1878, we do not feel inclined to reconsider our former rulings and follow the later decisions of the Supreme Court of the State in State *v.* Garroute, 67 Mo., 455, and State *v.* Dallas County, 72 Mo., 330, where this whole line of cases was substantially overruled. The bonds involved in this suit were all in the hands of innocent holders when the law of the State was so materially altered by its courts. In our opinion the rights of the parties to this suit are to be determined by the "law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." (Douglass *v.* Pike County, 101 U. S., 687.)

4. As to the stamps.

The act of July 13, 1866, (14 Stat., 141, ch. 184,) amending that of June 30, 1864, (13 Stat., 293, ch. 173, sec. 154,) provided that all official instruments, documents, and papers issued by the officers of the United States Government, or by the officers of any State, county, town, or other municipal corporation, should be exempt from taxation. This exempted the class of public securities to which these bonds and coupons belong. It is, indeed, said in a proviso that the intention was only to exempt State, county, town, or municipal corporations from taxation while in the exercise of the functions strictly belonging to them in their ordinary governmental and municipal capacity, but that does not, as we think, affect this case. These bonds were issued by this county in its municipal capacity, and for purposes which were declared by law to be municipal.

5. As to the proof of authority from the County Court.

It is conceded that, under the practice in Missouri, unless

the execution of the bonds was denied under oath, their execution was admitted. There was no such denial here. Hence it was only necessary to prove such facts connected with the execution as were directly put in issue by the pleadings. The only defense relied on under this branch of the case was the authority of the court to make the order it did. All else was, therefore, admitted. As the presiding judge was necessarily the president of the court, the bonds are not invalid because signed by the president as presiding judge.

6. As to proof of *bona-fide* ownership.

Ownership was alleged in the petition. This ownership at the maturity of the coupons and for value was denied in the answer. This clearly made the evidence not only proper but necessary.

Since all the defenses relied on involved questions of law only, except that as to *bona-fide* ownership, and the court correctly decided the legal propositions in a favor of the plaintiff, it was not error to instruct the jury to bring in a verdict for the plaintiff if they believed he was the *bona-fide* holder and owner for the coupons sued for.

The judgment is affirmed. AFFIRMED.

MICHAEL McCORMICK v. JOHN JAY KNOX, COMMISSIONER OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY, ET AL.

March 6, 1882.

A decree in a chancery suit allowing a junior incumbrancer to redeem real estate which had been sold at a trust sale on condition that he would pay off an incumbrance prior to his own, and also refund to such incumbrancer the amount of an incumbrance prior to both and the taxes and insurance on the property, which had been paid by such incumbrancer, gave him all the rights to which he was entitled, and was correct.

APPEAL from the Supreme Court of the District of Columbia.

Statement of the case.

The pleadings and evidence in this case disclose the following state of facts:

Prior to October 3, 1871, R. W. Bruff was the owner in fee of certain real estate in the city of Washington. On the day just mentioned he executed to Albert J. Meyer his promissory note of that date for $5,000, payable in five years, and secured it by a deed of trust on said property, with power of sale, to one Wimer as trustee. On June 29, 1872, Bruff conveyed the property to Mary J. Wheeler (widow), who afterwards, on July 1, 1872, for the accommodation of Bruff, made her note of that date, payable one year after date to the order of Bruff, for $2,000, and to secure it executed a deed of trust on the same property to W. H. Ward as trustee, with power of sale in case of default in the payment of the note.

On July 13, 1872, Bruff, for himself and his partner, one Holtzclaw, executed to the Freedman's Savings and Trust Company a note for $3,000, and as collateral security therefor deposited with the company forty shares in the Capitol Hill Building Association and the above-mentioned note of Mrs. Wheeler, secured as aforesaid. Payments were made upon the note of Holtzclaw & Bruff, so that on April 9, 1873, there appeared to be due thereon the sum of $1,045.

On June 3, 1873, Mrs. Wheeler conveyed the property to the appellant, Michael McCormick, by deed of that date, which, though absolute on its face, it is clear from the evidence was merely given as security for a pre-existing debt.

The Freedman's Savings and Trust Company having become insolvent, three commissioners were appointed under an act of Congress to take possession of and administer its assets. They entered on their duties about July 12, 1874. Default having been made in the payment of the balance due on the note of Holtzclaw & Bruff, and also in the payment of the note made by Mrs. Wheeler, the commissioners of the Freedman's Savings and Trust Company directed Ward, the trustee, to proceed to execute the trusts imposed on him by the trust deed made by Mrs. Wheeler on July 1, 1872. He accordingly ad-

Statement of the case.

vertised the property conveyed to him by the trust deed, and it was sold at public auction on March 17, 1876, and bid in by the commissioners, to whom Ward, the trustee, made a deed of conveyance.

The note for $5,000, which was held by Meyer, having become due, he insisted that it should be paid, and threatened, if it were not paid, to cause the property to be again advertised and sold under the trust deed to Wimer. The commissioners thereupon paid Meyer the amount due on the note held by him, namely, $6,128, and received from the trustee, Wimer, a deed of release to the property.

After the conveyance of the property by Ward to the commissioners, they took possession of it, and received its rents until March 17, 1879.

On March 15, 1879, McCormick filed the bill in this case against the commissioners. He founded his title to relief upon the deed made to him by Mrs. Wheeler on June 3, 1873. The prayer of his bill was that, on account of certain alleged informalities, the sale made by Ward, trustee, to the commissioners might be declared void and his deed cancelled, that an account might be taken of the balance due on the note secured by the trust deed to Ward, and that the rents received by the commissioners while in possession of the property might be set off against such balance, and for general relief.

The commissioners filed an answer and cross-bill. In the latter they prayed that the sale made to them by Ward, the trustee, might be ratified and confirmed and their title to the property declared good and valid.

McCormick, the appellant, answered the cross-bill, in which he denied the right of Ward, the trustee, to sell the property, the regularity of the sale, &c.

There were other pleadings in the case which are not necessary to be stated upon this appeal.

By virtue of an act of Congress approved February 21, 1881, the court made an order substituting Knox, the present appellee, for the three original commissioners. Upon final

hearing on the pleadings and evidence, the court in special term made a decree to the effect that McCormick or Mrs. Wheeler might redeem the property by paying the balance due on the note for $3,000 made by Holtzclaw & Bruff to the Freedman's Savings and Trust Company, and also the amount paid by the commissioners on the note held by Meyer, and the sums paid by them for taxes, insurance, and repairs upon the property in question, after deducting the rents collected by them; but in case said sums were not paid within thirty days after confirmation of the auditor's report ascertaining the same, the sale and deed by Ward, the trustee, to the commissioners should stand ratified and confirmed. McCormick appealed from this decree to the court in general term, by which it was affirmed, and has brought the case to this court by appeal from the latter decree.

John J. Weed and *W. A. Meloy*, for appellant.

Enoch Totten, for appellee.

Woods, J.—The counsel for appellant has submitted an argument to show that the sale and deed made by Ward, the trustee, to the commissioners of the Freedman's Savings and Trust Company was void. Without discussion of this question, we simply declare our opinion to be that there is no solid ground for this contention to rest upon. But whether the sale is valid or not is an immaterial question in this case, for the decree of the court below permitted the complainant to redeem the property, and so avoid entirely the effect of the sale and deed, by the payment of the balance due on the promissory note for $3,000 made by Holtzclaw & Bruff to the Freedman's Savings and Trust Company, and the amount due on the note for $5,000 made by Bruff to Meyer, and the taxes, &c., paid by the commissioners of the Freedman's Savings and Trust Company, after deducting the rents received by them. The decree of the court below substantially gives the appellant all the relief prayed for by his bill, on condition, however, that

he should pay off the incumbrances on the property in question, older and better than his own.

The only practical question, therefore, is, were the terms upon which the appellant and his grantor, Mrs. Wheeler, were allowed to redeem just and right? Upon this point, it seems to us, there can be no doubt. The amount due on the note of Holtzclaw & Bruff, it is conceded, is less than the sum due on the note of Mrs. Wheeler, which it was pledged to secure. Neither she nor her grantee, the appellant, can complain if they are required to pay the balance, whatever it may be, due on the Holtzclaw & Bruff note before they can be allowed to redeem. It is equally clear that they ought to be required to pay the sum applied by the commissioners to discharge the amount due on the note held by Meyer, which was secured by a trust deed on the premises in controversy and was the first lien thereon.

The contention of complainant that he should receive a clear title to the property without first discharging the lien thereon created by the trust deed of Mrs. Wheeler, and without first paying the sums which had been applied by the commissioners to the discharge of the lien held by Meyer, both of which were prior in date to his own, is not founded on any equity and is not supported by any authority. On the contrary, it is clear that the commissioners of the trust company, having paid off the oldest incumbrance on the property, are entitled to be subrogated to the rights of the incumbrancer. (Robinson *v.* Ryan, 25 N. Y., 320; Redmond *v.* Burroughs, 63 N. C., 242.)

A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be repaid the sum so advanced when the mortgagor or his vendee comes to redeem. (Page *v.* Foster, 7 N. H., 392; Arnold *v.* Foote, 7 B. Mon., 66; Harper *v.* Ely, 70 Ill., 581.)

The same rule applies to the payment by the mortgagee of taxes on the mortgaged premises, or any valid assessment thereon for public improvement. (Dale *v.* McEven, 2 Cow., 118.)

Statement of the case.

The decree of the court below gave the complainant every right which the law accorded him. It must, therefore, be affirmed.

AFFIRMED.

JOSEPH LEHNBEUTER AND CASPER CLAES *v.* ARNOLD HOLTHAUS AND ANTON HOLTHAUS, PARTNERS AS HOLTHAUS BROTHERS.

March 6, 1882.

1. The patent granted to Lehnbeuter and Claes, No. 8,814, dated November 30, 1875, for a certain kind of show-case, *held* on the evidence to have been infringed by defendants.
2. As against a party proved to have infringed, a patent is *prima-facie* evidence of both novelty and utility.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The bill, which was filed in the Circuit Court by the appellants, charged infringement by defendants of design patent No. 8,814 for show-cases, granted to the complainants jointly, and dated November 30, 1875.

The answer denied that the complainants were the first inventors of the design patented, denied its utility, and denied that the defendants infringed. To sustain these denials all the testimony offered by the defendants was directed.

Upon final hearing the Circuit Court dismissed the bill because "said letters-patent were not good and valid in law," and the complainants have brought the case to this court by appeal.

The record contained certain stipulations in respect to the evidence. These were:

"That the following exhibits may be produced by either party at the hearing upon an appeal in the Supreme Court, and used in evidence as a portion of the transcript herein, viz.: 'Defendants' Exhibit Wiegal Catalogue' and 'Defendants' Exhibit Maw's Price Current;' also, 'Design Patents Nos. 8,287, 8,813, and 8,814;' also, 'Complainants' Exhibit Holthaus Circular.'

Statement of the case.

"That it shall be taken as admitted for the purposes of this case that said exhibits, 'Wiegal Catalogue' and 'Maw's Price Current,' were issued prior to January, 1874.

"That the circular marked 'Complainants' Exhibit Holthaus Circular' is a copy of circulars issued by the defendants in the month of July, 1877, and subsequently thereto; that the cuts therein correctly represent show-cases made and sold by the defendants in St. Louis, within said Eastern District of Missouri, during and after January, 1877, and before the commencement of this suit, and still made and sold by them; also, that the circular marked 'Complainants' Exhibit Claes & Co. Circular' is a copy of a publication issued and circulated by complainants in the month of September, 1875, and subsequently thereto; also, that the model marked on bottom 'Complainants' Exhibit Model No. 1,' under the hand of the same notary, correctly represents show-cases made and sold by defendants in said St. Louis during and after the month of January, 1877, and before the commencement of these suits."

The only witness in the case was Charles K. Pickles, who testified for the complainants that he made the original drawings from which the plates were made of the cuts 33, 34, and 36 of the Holthaus circular; that he made the drawings for Holthaus, the defendant, who gave him cuts from Claes & Co.'s circular from which to make the plates or prints, and that there were slight changes suggested by Holthaus, which the witness followed in making the drawings.

The Wiegal catalogue, Maw's price current, the Holthaus circular, and the design patents, numbered respectively 8,287, 8,813, and 8,814, with their drawings, the first granted to Joseph Lehnbeuter, and the other two to Lehnbeuter and Claes, the complainants, were put in evidence. The one last named was that on which this suit was brought.

Robert H. Parkinson, for appellants.

No counsel appeared for appellees.

Opinion of the court.

WOODS, J.—A comparison of the drawing which is appended to patent No. 8,814 with cut No. 34 of the Holthaus circular, which it is admitted represents show-cases manufactured and sold by the defendants during and since January, 1877, makes it clear that the latter is a servile copy of the former, excepting a slight inclination backwards, hardly perceptible to the naked eye, of the glass constituting the front of the elevated portions of the case. We think, therefore, that the infringement is clearly established.

The attempt to prove that the complainants were not the first inventors of the design covered by their letters-patent has entirely failed. The only evidence offered on this branch of the defense are the publications designated as Maw's price current and the Wiegal catalogue. The first of these bears date in 1869 and the latter in 1872. After a careful search through both, we have been unable to find any design for a show-case which remotely resembles that described in the complainants' patent.

The design patented by the complainants differs essentially from any other which has been called to our attention. It is not covered by the other patents which are set out in the record. Whether it is more graceful or beautiful than older designs is not for us to decide. It is sufficient if it is new and useful.

The patent is *prima-facie* evidence of both novelty and utility, and neither of these presumptions has been rebutted by the evidence. On the contrary, they are strengthened. No anticipation of the design is shown, although the attempt has been made to prove anticipation. The fact that it has been infringed by defendants is sufficient to establish its utility, at least as against them. (Swayne, Justice, in Whitney *v.* Mowry, 4 Fisher, 207.)

Our conclusion is that the complainants have a valid patent which the defendants have infringed. The decree of the Circuit Court dismissing their bill must, therefore, be reversed,

and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

FREDERICK HOPT v. THE PEOPLE OF THE TERRITORY OF UTAH.

March 6, 1882.

1. Under a statute establishing degrees of the crime of murder, and providing that willful, deliberate, malicious, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.
2. Under a statute which requires the instructions of the judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine.

ERROR to the Supreme Court of the Territory of Utah.

J. G. Sutherland, for plaintiff in error.

S. F. Philips, Solicitor-General, for defendant in error.

GRAY, J.—The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court. Of the various errors assigned we have found it necessary to consider two only.

The penal code of Utah contains the following provisions:

"Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premediated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpe-

trated from a premeditated design unlawfully and maliciously to effect the death of any other human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." (Sec. 89.)

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." (Sec. 90, Compiled Laws of Utah of 1876, pp. 585, 586.)

By the Utah code of criminal procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally;" (sec. 257, cl. 7;) the jury, upon retiring for deliberation, may take with them the written instructions given; (sec. 289;) and "when written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." (Sec. 315, Laws of Utah of 1878, pp. 115, 121, 126.)

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was indorsed "refused" by the judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine

the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered, where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of, or attempt to perpetrate, arson, rape, robbery, or burglary. The degree of the offense depends entirely upon the question whether the killing was willful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime."

Upon this subject the judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused and the instruction given being matter of record and subjects of appeal under the provision of the Utah Code of Criminal Procedure, section 315, above quoted, their correctness is clearly open to consideration in this court. (Young *v.* Martin, 8 Wall., 354.)

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. (United States *v.* Drew, 5 Mason, 28; United States *v.* McGlue, 1 Curtis, 1; Commonwealth *v.* Hawkins, 3 Gray, 463; People *v.* Rogers, 18 N. Y.,

9.) But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points, (Commonwealth *v.* Dorsey, 103 Mass., 412,) and in well considered cases in courts of other States. (Pirtle *v.* State, 9 Humph., 663; Haile *v.* State, 11 Humph., 154; Kelly *v.* Commonwealth, 1 Grant, (Penn.,) 484; Keenan *v.* Commonwealth, 44 Penn. St., 55; Jones *v.* Commonwealth, 75 Penn. St., 403; People *v.* Belencia, 21 Cal., 544; People *v.* Williams, 43 Cal., 344; State *v.* Johnson, 40 Conn., 136, and 41 Conn., 584; Pigman *v.* State, 14 Ohio, 555, 557.) And the same rule is expressly enacted in the Penal Code of Utah, section 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act." (Compiled Laws of Utah of 1876, pp. 568, 569.)

The instruction requested by the defendant clearly and accurately stated the law applicable to the case, and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

One other error assigned presents a question of practice of such importance that it is proper to express an opinion upon it, in order to prevent repetition of the error upon another trial.

By the provisions of the Utah Code of Criminal Procedure already referred to, the charge of the judge to the jury at the

trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and the written charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal. The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury in deliberating upon the case, nor a court of error upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury which are not so reduced to writing and recorded, is error. (Feriter *v.* State, 33 Ind., 283; State *v.* Cooper, 45 Missouri, 64; People *v.* Sanford, 43 Cal., 29; Gile *v.* People, 1 Colorado, 60; State *v.* Potter, 15 Kan., 302.)

The bill of exceptions shows that the presiding judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July, 1868, page 559;" and that to the instruction so given an exception was taken and allowed.

This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. (Merrill *v.* Nary, 10 Allen, 416.)

For these reasons the judgment must be reversed and the case remanded with instructions to set aside the verdict and order a new trial.

REVERSED.

Syllabus.

FRENCH, HANNA & COMPANY v. JONATHAN K. GAPEN ET AL.; AND JAMES S. SPEARS AND OTHERS v. JONATHAN K. GAPEN, THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL, ET AL.

March 6, 1882.

The State of Indiana, after the original construction of the Wabash and Erie Canal, passed an act authorizing the engineer of the canal to let out a contract to so clear and improve the canal as to make surplus water-power available, and pledging to the contractors all the rents received from the lease of such water-power till they were paid; and certain contractors undertook and completed the work. Some leases were made, and the rents paid over to the contractors. Later, the State granted to a mill-owner on the St. Joseph River, whose mill had been almost deprived of water by tapping the river for the canal above his mill, and who was claiming damages from the State, the right to draw off from the canal a certain amount of water for a mill free of rent, which he accepted, released his claim for damages, and proceeded to make costly improvements. Subsequent to this the State issued certificates of indebtedness to fund a portion of the original cost of constructing the canal, and granted all its interest in the canal to trustees in pledge to secure these certificates, subject to all existing rights and equities against the State on account of the same. A chancery suit was brought by a holder of one of these certificates against the trustees alone as defendants, in which the canal was sold free of incumbrances and the proceeds paid into court. Petitions being filed by these lessees and contractors asking to be made parties, and to be allowed to share in the proceeds, which were dismissed by the lower court on demurrer: *Held*—

1. That the effect of the agreement with the contractors was to convey to them a property-right in the rents produced by leasing the water-power, and to make the State a trustee to collect and pay over the rents as fast as collected until the contractors were paid, and that it operated as a complete transfer in equity.

2. That the agreement to permit the mill-owner to draw water from the canal was in effect an absolute grant for a valuable consideration of the right, and that it was a property-right, and the legitimate subject of a grant.

3. That the trustees merely obtained the State's interest, subject to all prior incumbrances, and hence that the rights of the contractors and mill-owner were superior to those of the trustees, or of those claiming under a judicial sale of their interest.

4. That the contractors, mill-owner, and other lessees, while not necessary, would have been proper parties, and were entitled to intervene by petition, and submit to adjudication their rights against the proceeds of sale as the representative of the *res* itself.

APPEALS from the Circuit Court of the United States for the District of Indiana.

Shellabarger & Wilson, Hill & Nichol, I. G. Kimball, and *R. C. Bell,* for appellants.

Claypool & Ketcham and *R. S. Taylor,* for appellees.

WAITE, C. J.—The State of Indiana constructed the Wabash and Erie Canal from Lafayette, on the Wabash River, through Delphi and Fort Wayne, to the Ohio State line. To meet the expense of this undertaking a large bonded debt was created and secured in a general way by statutory provisions of a character similar to those contained in section 5 of an act of January 9, 1832, authorizing the first issue of bonds, and which is as follows:

"That for the payment of the interest and the redemption of the principal of the sums of money which may be borrowed under the authority of the General Assembly for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this act stated, there shall be, and are hereby, irrevocably pledged and appropriated all the moneys in any manner arising from the lands donated by the United States to this State for the construction of said section of canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof as finished; the sufficiency of which, for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guarantee." (Acts 1832, p. 2.)

From the beginning, the use of water for hydraulic purposes,

when not needed for navigation, seems to have been contemplated, and ample provision was made by statute for acquiring the necessary land and effecting leases of power. With a view to this end, the following "Act relative to water-power at the town of Delphi," was passed and approved January 9, 1842:

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be the duty of the engineer, or other person having charge of the Wabash and Erie Canal, on or before the 1st day of May next, to let by contract, to the lowest bidder, the clearing out and removing all obstructions from the bayou which extends from the canal at the said town to the Wabash River, for the purpose of creating water-power upon the said canal at that place.

"SEC. 2. *Be it further enacted*, That said engineer, or other person, before letting the said work, shall give public notice of the terms, conditions, and also the time of the said letting, by publishing the same in the newspapers printed in the said county, for two months, at least, previous to the time of said letting: *Provided*, That the said works shall be finished within six months from the time of said letting.

"SEC. 3. *Be it further enacted*, That the said engineer, or person having charge of that part of the canal, shall cause the work to be estimated when the same is completed, and shall give to the person doing the same a draft or other evidence of indebtedness, specifying what the same was given for, and the amount due him as by the said contract, and for the purpose of paying for the said work, the rents that may be received by the State for water-power created by this act shall be appropriated for that purpose, and to no other purpose; and the person or persons doing the said work shall look to the said rents for their pay, and to no other source whatever; and as fast as the said rents may be due or received, they shall be expended in paying for the said work until the whole amount is paid.

"SEC. 4. *Be it further enacted*, That so soon as the said work is let to some responsible person, it shall be the duty of the

said engineer, or other person, to lease out a portion of the water-power by this act created, not exceeding in all what would be sufficient to propel thirty runs of stones, at the same prices and upon the same terms and conditions as water-power under similar advantages is leased at other places upon the said canal, and it is made the duty of the said engineer, or other person, before leasing the same, to give at least two months' notice of the time, terms, and conditions upon which the same will be leased, in the newspapers published in the said county.

"SEC. 5. *Be it further enacted*, That it shall be the duty of the said engineer, or other person, as the agent on behalf of the State, for the purpose of securing to the State the advantages by this act contemplated, to purchase of the owner or owners of land lying adjacent to the place where said water-power is to be located, such real estate, not exceeding in all four acres, as may be necessary to carry into effect the provisions of this act, at such reasonable prices as may be agreed upon by the said agent and the owner or owners thereof; and in case of disagreement, at such prices as may be fixed by persons chosen by the said agent and the said owners: *Provided*, That in no case shall the prices paid by the State for such land exceed what has heretofore been paid for such property under the same or similar advantages, and for such real estate so purchased the said agent shall take a conveyance to the State by deed in fee-simple: *And provided further*, That nothing in this act contained shall be so construed as to authorize any interference whatever with the navigation of said canal.

"SEC. 6. *Be it further enacted*, That this law shall be in force from and after its passage."

Under the authority of this act James Spears and Reed Case entered into a contract with the State to do the work required upon the terms proposed, and before the 1st of December, 1843, had it all done. On the 19th of January, 1846, another act was passed, by which it was made the duty of the officer having charge of the canal east of Tippecanoe to settle as soon as possible with the contractors, and give them a certificate for

the amount found their due, to be paid out of the rents derived from the power created by what had been done, and also providing that the certificate should draw interest from the time the contract was completed until paid.

The settlement contemplated by this act was effected on the 29th of September, 1847, and the following certificate issued:

"DELPHI, *Sep.* 29, 1847.

"I hereby certify that Spears & Case have performed work to the value of $10,354.20, in cleaning out the bayou which extends from the canal at Delphi to the Wabash River, estimating according to the terms of a contract between said Spears & Case and S. Fisher, commissioner of the W. and E. Canal, dated May 1, 1842, made in pursuance of an act entitled 'An act relative to water-power at the town of Delphi, in Carroll county, approved January 20, 1842.' And according to the provisions of an act entitled 'An act authorizing a settlement with Spears & Case for work done on the side-cut at Delphi, in Carroll county, approved January 19, 1846,' the said Spears & Case are entitled to receive interest on said sum until paid. And I certify also that said work was performed prior to the first day of September, 1843.

"S. FISHER,
Gen'l Sup't W. and E. Canal."

On the 29th day of May, 1846, the State leased to George Robertson, at an agreed rent, a sufficient amount of power made available by the work done by Spears & Case to propel three runs of stone. Of this lease Enoch Rheinhart is the present assignee and owner. He still uses the water. All the rents derived from this lease down to November 1, 1875, have been paid and accounted for to Spears & Case.

In the construction of the canal it became necessary to take the water from the St. Joseph River near Fort Wayne. In doing this the power which supplied certain mills that had been erected on that river by Henry Johns was taken away, and on the 11th of February, 1843, the following statute was passed for his relief:

"AN ACT for the relief of Henry Johns.

"Whereas Henry Johns, of the county of Allen, previous to the commencement of the Wabash and Erie Canal, was the owner of a valuable mill privilege or water-power on the St. Joseph River, and had erected valuable mills thereon; and whereas the State of Indiana did afterwards erect a feeder-dam, to supply with water the summit level of the Wabash and Erie Canal, above the mills erected by said Johns on the St. Joseph River, thereby abstracting from the mills aforesaid about five thousand cubic feet of water per minute, which, in low stages of water, is all the water contained in the said river St. Joseph, and renders wholly useless the mills erected by said Johns; therefore—

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That the commissioner of the Wabash and Erie Canal be, and is hereby, directed to cause to be supplied to the said Henry Johns, his heirs and assigns forever, from the Wabash and Erie Canal, at the town of Fort Wayne, in the county of Allen, on land now owned or to be purchased by said Johns, a sufficient quantity of water to propel three pair of burr millstones free of any toll or water rent, and continue to supply the same for the use of said Johns, his heirs and assigns forever, at all times when the same shall not be needed to fill the contracts heretofore made with Samuel Edsall and Hamilton & Williams, or required for the purpose of navigating said canal: *Provided*, That the said Johns shall, for himself, his heirs and assigns, release to the State of Indiana all claims against the State for the abstraction of water from the St. Joseph River to supply the Wabash and Erie Canal, and shall also credit in full any or all awards or judgments that shall have been recovered by said Johns against the State for the abstraction of any water-power.

"SEC. 2. This act shall take effect and be in force from and after its passage."

In accordance with the provisions of this statute, and to

carry it into effect, the following agreement was entered into between Johns and the State on the 6th of July, 1843:

"This agreement, made this 6th day of July, 1843, between the State of Indiana, party of the first part, by S. Fisher, commissioner of the Wabash and Erie Canal, thereto duly authorized by law, and Henry Johns, of the second part, witnesseth:

"That said party of the first part, in consideration of the covenants and releases hereinafter contained, and upon the express condition that the party of the second part shall at all times comply with all and singular the limitations and conditions hereinafter contained, and shall in every respect perform all the stipulations of the agreement by said party to be performed, agrees to lease to said party of the second part forever, subject to the restrictions, limitations, and conditions hereinafter contained, the use and occupation of so much of the surplus water —not required for purposes of navigation, or to fill the contracts heretofore made with Samuel Edsall and Hamilton & Williams—at the town of Fort Wayne, to be used on lot number nine (9) of the county addition to said town, as will be sufficient, when properly applied on an overshot wheel of sixteen feet diameter, with the proper gearing, to be approved by the commissioner of said canal, to propel three run of four-and-a-half-feet millstones, grinding at the rate of five bushels per hour each, to be applied to such manufacturing purposes as the said second party may choose. It is understood that the second party to this agreement is entitled to the same quantity of water, whenever there is a surplus in the canal as above, that Allen Hamilton and Jessie L. Williams are entitled to under the lease bearing date 29th November, 1842. The water will be taken by a head-race from the canal at the place above described, and after passing over the wheel will be conducted by a suitable tail-race into the St. Mary's River. The flow of water to the wheel will be regulated and controlled by a permanent regulating weir, to be constructed in the most substantial manner, with stone side and breast walls, agreeably to a plan to be furnished by the commissioner of the canal, to be

built in every respect according to his directions, as not to endanger the safety of the canal in any manner whatever. And it is understood that the necessary regulating weir, head-race, and trunk to conduct the water to the wheel, and the tail-race to pass it from the wheel as above specified, are to be constructed by the party of the second part at his own expense and according to the direction of the commissioner aforesaid, and to be kept in good repair, so as to prevent the waste of water; and if at any time during the continuance of this lease any breach or other injury shall occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered to be out of repair, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the State the whole cost of repairing such breach or injury; and if the said party of the second part shall refuse or neglect to rebuild, repair, or strengthen said regulating weir or other works necessary to the security of the canal, after being notified in writing by the commissioner, superintendent, or other proper agent of the State that such removal is necessary for the safety of the canal, such refusal or neglect shall subject the party of the second part to a forfeiture of this contract or lease, at the option of the commissioner or other agent of the State thereto duly authorized.

"It is expressly understood by the parties hereunto that the first party does not agree to furnish water to the second party except at such times as there is a surplus over and above what is required for purposes of navigation and to supply existing contracts with Samuel Edsall and Hamilton & Williams. And the right is also reserved by the first party to draw the water from the canal whenever it may be necessary to repair or prevent breaches, take out bars, or make any repairs whatever.

"And the second party, for and in consideration of the right to the use and occupation of said water, agrees to release, and does hereby release, for himself, his heirs and assigns forever, all claim or claims against the State of Indiana for dam-

ages heretofore done, or that may hereafter be done, to any property now or heretofore owned by him, the said Henry Johns, in consequence of diverting water from the St. Joseph River to supply the Wabash and Erie Canal and the mills erected or to be erected thereon, or supplied therefrom.

"And the said Henry Johns hereby releases to the State of Indiana all his right and title to the water flowing in the St. Joseph River whenever the same may be necessary for the supply of the canal and mills aforesaid.

"And the said Henry Johns acknowledges the foregoing lease as being in full payment for all awards of damages heretofore made, and for all damages done or hereafter to be done by diverting the water as aforesaid.

"And it is understood by the parties hereto that the second party is to pay no rent other than releasing the first party from the payment of damages as above; and this agreement is made in pursuance of and with a view to carry out an act of the Legislature entitled 'An act for the relief of Henry Johns,' approved February 11, 1843.

"In testimony whereof we, the parties to this agreement, have hereunto set our hands and seals the day and year first above written. "S. FISHER, [SEAL.]

Com. W. & E. Canal.

"HENRY JOHNS. [SEAL.]

"Signed and sealed in presence of—

ALEX. MCCULLOCH."

All the rights conferred by this agreement or grant are now owned by French, Hanna & Co.

The State having become embarrassed by reason of its large indebtedness, growing out of the construction of this canal and other public improvements, passed an act on the 19th of January, 1846, to provide for the liquidation of the debt, by which new certificates of State stock were to be issued. One of these certificates, representing one-half the debt, was to be provided for by taxation in the usual way, and the other, representing the other half, out of the lands, tolls, and revenues

of the canal. As an instrument for carrying into effect the arrangement in respect to the half of the debt payable out of the tolls, &c., the board of trustees of the Wabash and Erie Canal was created and constituted a body corporate, to which on the 30th of July, 1847, a conveyance was executed as provided for in section 8 of the act, which is as follows:

"SEC. 8. So soon as said trustees shall have been elected or appointed as aforesaid, it shall be the duty of the governor, in the name and under the seal of the State, to execute and deliver to said trustees, by the corporate name of the board of trustees of the Wabash and Erie Canal, a deed or patent for the bed of the Wabash and Erie Canal and its extensions, finished and to be finished, from the Ohio State line to Evansville, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, locks, dams, water-power, and structures, and all materials provided or collected for its construction; and all the property, right, title, and interest of the State in and to the same, with all its appurtenances; and also all the lands and lots (not sold or disposed of) heretofore given, granted, or donated by the general government to the State to aid in the construction of said canal, or any part of it, or which may be hereafter acquired under or by reason of any existing grant, and all moneys due and to grow due, and remaining unpaid on account of any sale or sales heretofore made of any canal lands so donated, and all moneys due or to grow due on account of any existing leases of any water-power or other privilege on said canal, its side-cuts, feeders, basins, or other appurtenances; said board of trustees to have, hold, possess, and enjoy the same as fully and absolutely as the State can or could do; subject, nevertheless, to all existing rights and equities against the State on account of the same or any part thereof, or liabilities of the State growing out of or in relation thereto; and the same to be held by said trustees in trust and security for the uses and purposes following, that is to say—"

It is unimportant in this case to notice the specifications in

respect to the trust any further than to say that the trustees were given no power to sell the canals.

The trustees took possession under this conveyance, and on the 5th of July, 1852, executed a lease to Spears, Case & James P. Dugan of water at Delphi equivalent to three millstone powers, reserving a certain agreed rent. This lease is now owned and the power used by Abner H. Owen, and the trustees accounted to Spears & Case for all rents collected under its provisions down to November 1, 1875.

On the 19th of November, 1874, Jonathan K. Gapen, a holder of certain of the certificates of stock provided for in the conveyance to the trustees, filed a bill in equity in the Circuit Court of the United States for the District of Indiana against the trustees, in behalf of himself and the other holders of the same class of securities, setting forth in substance that by reason of the failure of revenues from the canal it was impossible to keep it in a condition for use; that the trust was insolvent and the trust property rapidly falling into decay, and praying "that the pledge and appropriation recited in said stocks shall be effectuated and the said canal and its appurtenances and lands may be decreed to be sold in such manner and on such terms as the court may deem best for the interests of those entitled to share in the proceeds thereof, and so as to bring the highest price therefor, and so as to vest title in the purchaser or purchasers thereof, with the right and duty to impose, maintain, and operate the same and receive and enjoy the future tolls and revenues thereof as fully in all respects as the State might originally have done; and on such sale being made and the proceeds brought into court, your orator prays that the said fund may be divided among himself and all other holders of said canal stocks according as their several ownerships, amounts, and priorities may be from time to time established to the satisfaction of the court, and so decreed."

To this suit neither Spears & Case nor Johns, nor any one representing their interests, was made a party. The trustees of the canal were the only defendants; and on the 24th of

December, 1875, a decree was made "that the Wabash and Erie Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, rights of ways, locks, dams, water-powers, and structures, together with all its appurtenances, also all lands and lots * * * * * belonging to the trust and vested in the Wabash and Erie Canal," be sold. Under this decree all that part of the main line of the canal from the western boundary of the city of Lafayette to the Ohio State line was sold to William Fleming for $85,500. This sale was confirmed on the 12th of February, 1877.

On the 7th of July, 1877, before any final distribution of the proceeds of the sale had been made, Spears, for himself and as surviving partner of the late firm of Spears & Case, and the widow and children of Case, who had before that time died, filed an intervening petition, called in the record a cross-bill, in which they set forth their connection with the water-power at Delphi, substantially as has been already stated, and alleged that there was still due them from the State, on the certificate which they held, the sum of $24,678.86. They then averred that the purchasers of the canal had collected the water-rents under the leases owned by Rheinhart and Bowen that fell due after November 1, 1875, and refused to account to them, and that there was sufficient surplus water in the canal at Delphi to supply power for the stipulated amount of thirty runs of stones, which the trustees had declined to lease previous to the sale.

The prayer of their petition was as follows:

"That upon the final hearing of this cause the court will order, adjudge, and decree that the sum which shall be found to be due to the plaintiffs shall be paid by the said Samuel B. Gookins, as such receiver, out of the funds now in his hands; or if the court shall be of opinion that the plaintiffs are not legally entitled to any relief hereinbefore prayed for, then they pray that it shall be ordered, adjudged, and decreed by the court that they be entitled to demand and receive from the said lessees and their assigns all sums of money due from them

for the rent of the water-power as aforesaid, or that may accrue from the 1st day of May, 1877; that a receiver be appointed to take charge of the said water-power, manage and control the same, and collect the rents therefrom, and apply the same to the payment of the claim of the plaintiffs until the same is fully paid, and that the said receiver shall be authorized and empowered to make such additional leases of the said water-power as can be safely done without interfering with the navigation of the said canal, but not to exceed thirty run of stone; that the said purchasers and owners of the said canal from the city of Logansport to the city of Lafayette, as aforesaid, be required to keep and maintain the dam, lock, and canal in good condition, to preserve and maintain said water-power at the said city of Delphi, and that the said receiver be required to compel the lessees of the said water-power to keep and perform the stipulations contained in the leases aforesaid as to making of repairs of the said canal; and for all other and further relief to which the plaintiffs are entitled by virtue of matters and things hereinbefore stated."

On the 15th of May, 1878, French, Hanna & Co., as assignees of Johns, filed their intervening petition in the cause, also called in the record a cross-bill, in which they set forth the facts in relation to the power granted to Johns, substantially as has already been stated, and then averred as follows:

"Your petitioners further show that, in expectation of the permanent enjoyment of said water-power, they have erected large and extensive woolen mills on said lot nine (9) in Fort Wayne, at a cost of $25,000, and for many years have been operating the same by means of said water-power on said canal so granted to said Johns and thence conveyed to them; that the part of said canal in Allen county, including that supplying said water-power, is still kept up by said purchasers; that said water-power is of great value to your petitioners, as was the grant made by said Johns on the river for the same; that the annual value of said water-power is at least $1,500, and the aggregate value of the same is not less than $25,000, and in

the sale of said canal the water-power so granted to said Johns and now owned by petitioners added at least $20,000 to the price paid and to the fund now in court. Your petitioners further show that by said sale so made of said canal property, of every nature and description, a large fund, to wit, $150,000, has been realized, and is now in the custody of this court, and that of said fund at least $50,000 has been derived from the sale of that part of said canal which is supplied with water only by the feeder constructed to divert the water, and from the water in fact diverted from the St. Joseph River above the mill of said Johns as aforesaid, and which was so ceded by said Johns to the State as aforesaid, and that of said $50,000 so realized at least four-fifths was derived from the sale of the water-powers on said canal made by the water so diverted from the mill of said Johns and ceded to the State as aforesaid as the condition for the grant of said perpetual water-power to him; that said purchasers contend that said property was sold to them absolutely free and clear of all claims of your petitioners, while it is, on the other hand, pretended by the receiver and said trustees that your petitioners have no claim whatever on said funds; whereas your petitioners insist that, as they had a claim in the nature of a personal liability against said State, that the same was assumed by said trustees, and that their said claim was and is a charge not only on said fund, but that it also follows said property into whosesoever hands it passes."

The prayer of the petition is as follows:

"But insomuch as there is great danger that, from the abandonment of said canal as a public highway, it may go to ruin, and your petitioners' claim upon the property itself become of little value, and by reason of your petitioners' manifest equity in the premises, and forasmuch as this large fund, so derived from the sale of said property, is now in the custody of this court for distribution to all parties equitably interested therein, and forasmuch as all the parties, as well the purchasers as the original complainants and defendants herein, are still before the court for the settlement of all equities in the premises:

"Your petitioners pray that they have leave to file this their intervening petition; that said parties to this original suit, the said Samuel B. Gookins, as such receiver, and the said William Fleming, John H. Bass, Oscar A. Simons, James Lillie, George J. Bippus, and Robert Simonton, as purchasers, and each of them, be required to make full and answer in the premises, and show, if they can, why your petitioners should not be paid out of said fund any damages which they may sustain by reason of the abandonment of said canal by the State and by said trustees, and why the estate of said purchasers in said property shall not be declared to be servient to that of your petitioners, and upon the hearing will your honors grant to your petitioners all such relief as may be just, equitable, and proper."

In each of the petitions it was stated that Fleming, the original purchaser, had transferred a part of the property to others. All these purchasers, as well as Fleming, the trustees of the canal, Gapen, and Gookins, who in the progress of the cause had been appointed receiver, were named in the petitions as defendants, and they all appeared and filed demurrers. These demurrers were sustained below and the petitions dismissed. From the decrees to that effect the present appeals were taken.

The first questions to be settled relate to the rights of Spears & Case, Johns, and the trustees of the canal respectively, under their several contracts with the State.

1. As to Spears & Case.

To our minds it is clear that the effect of what was done with these parties was to convey to them a property right in the rents produced by leasing the water-power made available through their work, to continue until the compensation stipulated for was paid in full. The State assumed no pecuniary obligation in the contract that was made, and Spears & Case agreed to look only to the rents for their pay. To this end the State "appropriated," that is to say, set apart, the rents for the use of Spears & Case, and made itself a trustee to collect and pay them over as fast as received. No other reasonable construction can be given to the language of the statute on which

the rights of the parties depend. In effect the State said to the contractors, "If you will do the work necessary to create the power, or, in other words, if you will make the water in the canal available for power at the place designated, you shall have the revenues which accrue from the use of the power so created and made available, until you are paid for your work at the agreed rate." The undertaking on the part of the State was not to pay out of a particular fund, but that the fund when raised should belong to the contractors. The debt was in reality not a charge against the State, but against the water-power. The language in this statute is even more explicit than that in the fifth section of the act of 1832, which this court held, in Trustees, &c., *v.* Beers, 2 Black, 448, created a lien on the canal, its lands and revenues, as security for the bonds that were issued, which could not be divested by any subsequent legislation. Here the very statute which authorized the creation of the power "appropriated" the revenue to be derived from the power primarily to the payment of the expense of its creation, and expressly provided that payment of such expense should not be made in any other way. Not only did the contractors agree to look alone to the rents for their compensation, but the State appropriated the rents to their use. There was both the giving and taking which operated as a complete transfer, at least in equity.

Our conclusion, then, is that from the time Spears & Case completed the work under their contract, the State held the water-power made available by what they had done to the extent of the amount required to propel thirty runs of stone, in trust, to lease on the terms and conditions specified, whenever it could be done without detriment to navigation, and pay over the rents as received to Spears & Case until their claim was satisfied. In fact the State never became the beneficial owner of the power that was created. From the time of its creation it belonged in equity to Spears & Case until their charge upon it was paid. The State held the legal title coupled with authority to make the contemplated leases, but this was to be for the use

and benefit of Spears & Case so long as anything remained due to them for what they had done. Such was the manifest intention of the parties, and that, in a court of equity, is enough. (Ketchum *v.* St. Louis, 101 U. S., 316.) It is no doubt true that Spears & Case in their contract assumed the risk of a loss of the power by the decay or destruction of the canal, and that the State was under no binding obligation to keep up the repairs so as to supply the power; but that is not the case presented by this demurrer; for it is expressly averred that the canal is still maintained, and that the water is being furnished to the different lessees under their respective leases. For all the purposes of the present appeal, we must take that averment as true. If the facts are otherwise, it may, perhaps, be shown in defense.

2. As to Johns and his assignees.

Here, we think, was an absolute grant, for a valuable consideration, by the State, to Johns, of the right to draw water from the canal for the purpose and on the terms and conditions specified. It was not a grant of the lands on which the canal was built, but of the right to draw water from the canal to be used in lieu of that which had been taken away. Originally Johns took the power directly from the river to his mill. Under his grant he was allowed to draw it through the canal, subject to the limitations and restrictions provided for. The only substantial difference between his rights and those of the other lessees of power was that they were to pay rent at stated periods for the water they used, while he was to draw without payment of rent, in consideration of his release of the damages he had sustained by the diversion of the water from the river to the canal. What he got was the grant of a right to enter on the canal and draw water therefrom to his mill whenever and so long as there was a surplus over what was wanted for navigation and the supply of the earlier leases. This was a property right, and the legitimate subject of grant. (DeWitt *v.* Harvey, 4 Gray, 488.) Johns could not, any more than Spears & Case, compel the State to keep the canal in repair so

as to give him the water, but as long as the canal was maintained and the water furnished he had the right to draw. In this petition, as in that of Spears & Case, it is expressly averred that the canal is still maintained and supplied with water.

3. As to the trustees of the canal.

By an express provision in the grant to the trustees, their title was made subject to all existing rights and equities against the State on account of the property conveyed, or any part thereof, and to all liabilities of the State growing out of or in relation thereto. In other words, the State conveyed all its remaining interest in the canal, and the trustees took what they got charged with the same trusts and incumbered by the same liabilities that rested on it when the grant was made. It follows that whatever property rights Spears & Case or Johns had in the canal before the grant, they retained after it. All that the State was bound to do in respect to them before, the trustees must do afterwards. As the State was the trustee of the power at Delphi for the benefit of Spears & Case when the transfer was made, the trustees took the title subject to the same trust, and became bound in respect to its management in the same way and to the same extent the State had been until that time. Rents collected after the transfer were as much the property of Spears & Case, in the hands of the trustees, as they were in the hands of the State. So, too, in respect to Johns. Whatever water he could draw from the canal before the transfer he was entitled to draw afterwards. All that the State could be required to do for his benefit at the time of the transfer, the trustees were bound to do while they held the property. The obligations of the trustees in respect to both these parties were precisely the same as those of the State; no more and no less.

It only remains to consider whether the petitioners are entitled to relief in this suit and under the form of proceeding they have adopted.

They were not originally parties to the suit. No sale of

the trust property could be made in their absence which would dispose of their rights. All that could pass under such a sale would be that which was conveyed by the State to the trustees, to wit, the canal, &c., subject to the prior rights of the petitioners. No decree, binding on the petitioners, could be rendered defining what their rights actually were. A purchaser would take only what the trustees held, and be left to settle with the petitioners as best he could.

But while the petitioners were not in fact parties, they might with propriety have been made such; and there cannot be a doubt that if they had intervened before the decree of sale, and asked to be made defendants, it would have been within the power of the court, with the consent of the complainants, to take them in. The case did go on without them, presumably because it nowhere appeared until their intervention that there were any such outstanding rights as they claim. The decree as entered is broad enough on its face to authorize a sale of the property free of all incumbrances. The purchasers, acting on the idea that they bought all the water-power in the canal, and that the rights of the several petitioners had been extinguished, claim the rents under the Delphi leases as their own, and threaten to cut off the supply of water to the assignees of Johns unless rent is paid for what is used. In this condition of things, and while the purchase-money was under the control of the court, the petitioners intervened and asked to have their rights in the premises determined before any final distribution of the money was made. To their intervention no exception is taken by any of the parties. They are, therefore, to all intents and purposes, now to be treated as though they had originally been made defendants and set up their demands. It seems to us eminently proper that before the money paid under the sale is put beyond the control of the court it should be determined what, under the new developments, the rights of the several parties in respect to the property in question really are. From what appears it is clear that the court expected to sell, and the purchasers supposed they were

buying, the whole property free of all incumbrances. If that be so, the money in the hands of the court may not, perhaps, improperly be treated as representing what it was supposed would pass by the sale, rather than what actually did pass as the parties stood when the decree was entered. The petitioners, in their intervening petitions, state in terms their willingness to treat the sale as binding on them, if they can be paid from the proceeds what in equity represents the value of their interest in the property sold. As the case now stands we see no reason why this may not be done. But we have only part of the record in the original suit here, and it may be that under all the circumstances such relief would not be just to the complainants. In that event it may be proper for the court to consider whether the facts connected with the sale were such as to make it inequitable to hold the purchasers to their purchase subject to the rights of the petitioners, in case they shall elect not to be bound.

Without deciding what, upon the final hearing, should be the form of relief afforded the petitioners, we are clearly of opinion that upon the facts stated in their petitions they are entitled to have their rights in the premises ascertained and something done in their behalf. The prayer of the petition of Spears & Case is for alternative relief. If it shall be determined that their interest in the property passes by the sale, they ask to be paid its value from the proceeds. If it does not, then they seek to have their rights, as against the purchasers, specifically ascertained and determined; the rents which have accrued and which may hereafter accrue from the Delphi leases paid over to them, and the proper steps taken to make the unused power at that point available for the liquidation of what is still due on their certificate. French, Hanna & Co., the assignees of Johns, ask to be paid the value of the power which was granted to them, and for general relief. Under this prayer for general relief the court will be authorized to establish their right to the use of the water as granted, free of rent, in case it shall be de-

termined they are not entitled to be paid the value of their power from the proceeds of the sale.

Without pursuing the inquiry further, we conclude the court was wrong in sustaining the demurrers and dismissing the petitions. The decrees dismissing the petitions are therefore reversed, and the causes remanded with instructions to overrule the demurrers and proceed thereafter as justice may require, not inconsistent with this opinion.

REVERSED.

THE COUNTY OF MOULTRIE v. GEORGE B. FAIRFIELD.

March 6, 1882.

1. In a suit on certain coupon bonds of a county, to which the defense was made that the county had issued more bonds than was allowed by law, *held*, on the facts, that the class known as donation bonds were first authorized, and were valid, even conceding that the alleged limit in amount was exceeded by the class known as subscription bonds.
2. Inasmuch as the bonds showed their regularity on their face and the authority under which they were issued, the *bona-fide* holder was not bound to look further and inquire whether the limit in amount had been exceeded.
3. One section of the charter of a railroad provided that the counties along its line might make subscriptions or donations to the railroad after a popular vote authorizing it; and another section provided that a particular county might, by its board of supervisors, make a subscription of a certain amount, and did not require a popular vote: *Held*, That the two sections were not inconsistent, and that a donation might be made under one and a subscription under the other.
4. It appearing that the donation was authorized in 1869, the bonds were not invalidated by the amended Constitution of Illinois of 1870, but come within the proviso of the first additional section of the same.
5. The mere transposition of two of the words of the name of the railroad to which the aid was to be voted in the petition for and notice of the election authorizing the subscription, did not avoid the donation nor the election, it being evident what railroad was intended.
6. It is no defense to a suit on the bonds that the payment of the same will require the levy of a tax greater than the State Constitution allows, even if the constitutional limit applies to the case at bar; as to which the court expresses no opinion.

Opinion of the court.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action brought by George B. Fairfield, the defendant in error, against the county of Moultrie, the plaintiff in error, upon the common counts, for money lent, money had and received, and money due on account stated, with notice that the plaintiff would give in evidence coupons detached from certain bonds of said county issued in satisfaction of a donation made by the county in aid of the Bloomington and Ohio River Railroad Company, and also coupons detached from certain other bonds of the county issued in satisfaction of a donation made by the county in aid of the Decatur, Sullivan and Mattoon Railroad Company. The defendant pleaded non-assumpsit; but it was agreed that under this plea the defendant might offer any evidence and make any defense that would be competent under any special plea well pleaded. The parties waived a jury and submitted the issues of fact as well as of law to the court. The court made a special finding of facts, upon which it rendered judgment in favor of the plaintiff below; to reverse which this writ of error is brought.

John R. Eden, for plaintiff in error.

S. M. Cullom and *O. J. Bailey*, for defendant in error.

WOODS, J.—We shall first consider the objections raised by the plaintiff in error to the recovery upon the bonds of the county of Moultrie issued to the Decatur, Sullivan and Mattoon Railroad Company. The charter of this company took effect March 26, 1869. The ninth section provided as follows: "The several incorporated towns, cities, counties, and towns organized under the township organization law, along or near the route of said road, or that are in any way interested therein, may in their corporate capacities subscribe to the stock of said company, or make donations thereto to aid in constructing or equipping said railroad." Then followed a proviso making subscriptions to the stock and donations

conditional upon a vote of the people and prescribing the mode of holding elections, &c.

Section 10 of the charter declared: "The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company to an amount not exceeding eighty thousand dollars, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations and to mature at such time as said board of supervisors may determine; provided that the same shall not be issued until said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

It appeared from the records of the board of supervisors of the county, as stated in the findings of the court, that on November 2, 1869, an election was held according to law in the county of Moultrie, at which a majority of the votes cast was in favor of a proposition to donate the sum of seventy-five thousand dollars to the Decatur, Sullivan and Mattoon Railroad Company, such donation to be paid in the bonds of the county when the railroad should be completed and in running order through the county; and that in pursuance of said vote the board of supervisors, on December 19, 1869, passed an order that there be donated by the county of Moultrie to the Decatur, Sullivan and Mattoon Railroad Company the sum of seventy-five thousand dollars, and that when the company should have completed its railroad through the county of Moultrie there be issued and delivered to the railroad company the bonds of the county to the amount of seventy-five thousand dollars, payable in ten years, in satisfaction of such donation; and that on November 1, 1871, the chairman of the board of supervisors and the clerk of the county issued and delivered to the railroad company seventy-five bonds of one thousand dollars each in satisfaction of said donation. These bonds recited on their face that they were "issued by said county of Moultrie by virtue of a vote of a majority of the legal voters of said county voting at an election held in said

county of Moultrie on the 2d day of November, 1869, which election was authorized by and conditioned according to the provisions of an act of the General Assembly of the State of Illinois, approved March 26, 1869, entitled an act to incorporate the Decatur, Sullivan and Mattoon Railroad Company."

The court further found that the defendant in error was a *bona-fide* purchaser for value before maturity of the bonds issued to the Decatur, Sullivan and Mattoon Railroad Company, from which the coupons offered in evidence were detached.

The facts above stated as found by the court, and the authority for the issue of the bonds contained in the charter of the Decatur, Sullivan and Mattoon Railroad Company, establish *prima facie* the validity of the bonds and the right of the defendant in error to a recovery upon the coupons cut from them.

The plaintiff in error insists, however, that there are other facts set forth in the findings of the court which show the invalidity of the bonds under consideration. These are that, at the December special term, 1869, of the board of supervisors of Moultrie county, an order was passed that the county subscribe to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, by authority of section 10 of its charter above recited, the sum of eighty thousand dollars; that said subscription was then and there made, and that on December 31, 1872, the railroad then being open for traffic between Decatur and Sullivan, the bonds of the county were issued and delivered to the company in payment of its subscription of stock.

The contention of counsel for plaintiff in error is that the board of supervisors of the county of Moultrie having, in December, 1869, subscribed to the capital stock of the railroad company the sum of eighty thousand dollars by authority of section 10 of the charter of the company, it had given all the aid to the railroad company which the law authorized it to give. In other words, it is insisted that the county could not

subscribe the full amount of stock authorized by section 10, and also make a donation to the company under section 9; that it could only do one of these two things. The inference which is drawn from this position is that the bonds issued in satisfaction of the donation to the railroad company, voted for by the people of the county and subscribed by the board of supervisors, were issued without authority, and are, therefore, void.

We cannot concur in the view of the plaintiff in error for several reasons. First, it is conceded that the board of supervisors could either subscribe any sum not exceeding eighty thousand dollars to the stock of the railroad company under section 10 of its charter, and issue the bonds of the county in payment thereof, or it could make a donation to the railroad company, under section 9 of the charter, of any amount which had been voted for by the voters of the county, and issue the bonds of the county in satisfaction thereof. As the county sets up as a matter of defense against the donation bonds issued to the Decatur, Sullivan and Mattoon Railroad Company the fact that a subscription of stock had also been made in payment of which the county had issued its bonds, it stands it in hand to show that the obligation of the county to issue its bonds in payment of its stock antedated its obligation to issue its bonds in satisfaction of its donation. This the findings fail to show. They do not show which was first voted by the board of supervisors, the donation or the subscription. They do show, however, that before any action was taken by the board in reference either to donation or subscription, to wit, on November 2, 1869, the electors of the county had voted in favor of donation. They further show that the county agreed to issue its bonds in satisfaction of its donation when the railroad company had completed its road through the county of Moultrie, and to issue its bonds in payment of its stock when the railroad should be open for traffic between the city of Decatur and the town of Sullivan; that the railroad was completed through the county of Moultrie as early as October 20, 1871,

and that the donation bonds were issued and bore date November 1, 1871; that the railroad was not open for traffic between Decatur and Sullivan until December 31, 1872, and that on that day, fourteen months after the issue of the donation bonds, the subscription bonds were executed and issued. If either class of bonds, therefore, has any advantage over the other on the question of authority for their issue, it would seem to be the donation bonds.

We remark, secondly, that as there was authority for the issue of the donation bonds, and that authority is recited on their face by reference to the law from which the authority was derived, the purchaser before maturity was not bound to look further. The county having authority to issue bonds like those purchased by him, he was under no obligation to inquire whether the county had issued more bonds than the law authorized. (Lynde *v.* The County, 16 Wall., 6; City of Lexington *v.* Butler, 14 Wall., 282; Marcy *v.* Township of Oswego, 92 U. S., 637; Humboldt Township *v.* Long, Id., 642.)

But, thirdly, we are clearly of opinion that under section 10 of the charter of the railroad company the county might subscribe for stock to an amount not exceeding eighty thousand dollars and issue its bonds in payment thereof, and under section 9 of the same charter make a donation to the same company and issue its bonds in satisfaction thereof.

It is clear, and it is conceded in the brief of the plaintiff in error, that the county of Moultrie is included within the terms of section 9, which applies to counties along or near the route of the railroad, or that are in any way interested therein. It is also clear that if there were no section 10 the county might, upon a vote of the people authorizing it, make a donation of any amount to the railroad company.

Section 10, which authorizes a subscription to the stock of the company, within certain limits and without any vote of the people, does not preclude a donation under section 9. The obvious construction of the two sections, taken together, is that any county along the line of the railroad, upon a vote of the

people, may, without limit, either subscribe to the stock of the company or make it a donation to be paid for in bonds, and that the county of Moultrie may subscribe to the stock of the company, without a consenting vote of the people, any sum not exceeding eighty thousand dollars. We must give this construction to the two sections if we allow both to have their full effect, and, if possible, they should be so construed as to give full effect to both, without any limitation or condition not incorporated in them by the Legislature. The authority granted to Moultrie and other counties by section 9 to make donations is not restrained or repealed because authority is granted to Moultrie county, by another section and upon different conditions, to subscribe stock. One section is not inconsistent with the other, and therefore does not repeal it.

The next reason upon which the invalidity of the bonds and coupons under consideration is based is the section of the Constitution of Illinois of 1870 which declares: "No county, city, town, or township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, when the same have been authorized under existing laws, by a vote of the people of such municipalities under existing laws." (First additional section.)

The proviso of this section has been construed by the Supreme Court of Illinois—and this court has followed that construction—to extend to donations as well as subscriptions of stock. (Chicago and Iowa Railroad Co. *v.* Pinckney, 74 Ill., 277; Middleport *v.* Ætna Life Ins. Co., 82 Ill., 562; Lippincott *v.* The Town of Pana, 92 Ill., 24; Fairfield *v.* Gallatin Co., 100 U. S., 47.)

According to the findings of the court below, the records of the board of supervisors of the county of Moultrie show that an election was held before the adoption of the Constitution of

1870, by which the donation was authorized, which the bonds in suit were issued to satisfy; and we have already seen that such election was authorized by section 9 of the charter of the railroad company. The prohibition of the Constitution does not, therefore, extend to the donation made in this case, or the bonds issued in satisfaction thereof.

An attempt is, however, made by the plaintiff in error to show that no election by which said donation was authorized was ever held; because in the petition for the election and in the notice of the election the railroad company to which the donation was to be made was designated as the Mattoon, Sullivan and Decatur Railroad Company, and not by its true name, to wit, the Decatur, Sullivan and Mattoon Railroad Company. And the contention is that as there was no vote of the people which authorized the donation in question to the Decatur, Sullivan and Mattoon Railroad Company, the power of the county to make the donation was cut off by the Constitution of 1870.

There can be no doubt on the question what railroad company the people of Moultrie county intended to make their donation to. The statute books of the State of Illinois will be searched in vain to find an act incorporating a railroad company by the name of the Mattoon, Sullivan and Decatur Railroad Company. There can be no question that in the petition for and notice of the election the railroad company intended was that known and chartered as the Decatur, Sullivan and Mattoon, for the petition and notice designate the route upon which said road was to be built, and upon which it afterwards was built, and they refer to the provision of the charter of the Decatur, Sullivan and Mattoon Railroad Company, which authorized the donation upon the making of which the voters were to express their will.

But a conclusive circumstance against the county to show to what railroad company the donation was voted is found in the records of the board of supervisors, set out in the findings of the court, in which it is distinctly stated that the petition

for the election requested that an election be held in pursuance of an act entitled an act to incorporate the "Decatur, Sullivan and Mattoon Railroad Company," to decide whether a donation of seventy-five thousand dollars shou'd be made to said Decatur, Sullivan and Mattoon Railroad Company, and that such election was held on November 2, 1869, and resulted in favor of donating said sum of seventy-five thousand dollars to the Decatur, Sullivan and Mattoon Railroad Company. It was therefore ordered that said sum be donated to the Decatur, Sullivan and Mattoon Railroad, and when said company should have completed its road through the county of Moultrie, that the bonds of the county should be delivered to it in satisfaction of such donation.

These records of the board of supervisors show what the understanding of the representative body of the county was, in respect to the railroad company to which the donation was voted. There can, therefore, be no doubt about the identity of the company which the voters of the county had in view when the election was held. It is certain that on November 2, 1869, an election was held by the voters of Moultrie county, and a donation of seventy-five thousand dollars voted to some railroad company. The circumstances to which we have adverted do not leave the least doubt that the company was the Decatur, Sullivan and Mattoon Railroad Company. Upon such a state of facts the law is well settled.

Even a contract is not avoided by misnaming the corporation with which it is made. (Building Association *v.* Martin, 2 Beasl., 427.) And if a corporation is misnamed in a statute, the statute is not thereby rendered inoperative if there is enough from which to ascertain what corporation is meant. (Chancellor of Oxford's Case, 10 Co. Rep., 44, 57*b*.)

"Although the names of corporations are not merely arbitrary sounds, yet if there be enough to show that there is such an artificial being, and to distinguish it from all others, the body politick is well named, though the words and syllables are varied from." (Bacon's Abr., tit. Corporation, c. 2.) And

it has been held by the Supreme Court of Illinois that the transposition of words comprising the name of a corporation is unimportant if it be evident what corporation is intended. (Chadsey *v.* McCrary, 27 Ill., 253.)

We are, therefore, of opinion that the transposition in the petition for and notice of the election of two of the words of which the name of the corporation to which the aid was to be voted was in part composed, cannot render the election invalid and void.

It is, therefore, clear that the donation voted for at that election is taken out of the operation of that clause of the Constitution of the State which declares that no municipality shall make donations to or loan its credit in aid of any railroad or private corporation. In our opinion none of the objections which we have noticed, to the validity of the bonds under consideration, are well taken.

The remaining objection to the validity of these bonds and coupons is also urged against a recovery on those issued to the Bloomington and Ohio River Railroad Company, and is the only ground of defense against the last-named bonds. This objection we shall now consider. It is based on section 8 of article 9 of the Constitution of Illinois, which declares:

"County authorities shall never assess taxes the aggregate of which shall exceed seventy-five cents per one hundred dollars' valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote."

To show the applicability of this provision to the question in hand, the plaintiff in error offered evidence in the court below, on which the court made the following findings:

"That at the time of the issuing of said bonds the indebtedness of said county, including said bonds, was two hundred and seventy-five thousand dollars, and the valuation of the taxable property of said county was two million two hundred and seventy-nine thousand and eighty-four dollars, and that the sum of ten thousand dollars per annum was required to

defray the necessary ordinary expenses of said county; and that at the time of the rendition of the judgment in this cause the indebtedness of the county, including accrued interest, was three hundred and seventy-five thousand dollars, and the valuation of the taxable property therein was three million five hundred and eighty-nine thousand two hundred and fifty-one dollars, and that it required twelve thousand dollars per annum to defray the necessary ordinary expenses of said county.

"That to enable said county to pay the indebtedness created by said donations to said Bloomington and Ohio River Railroad Company, and to said Decatur, Sullivan and Mattoon Railroad Company, evidenced by said bonds still outstanding, the interest coupons upon which were sued on and offered in evidence in this case, will require the annual assessment of taxes which will exceed seventy-five cents per $100 valuation of the taxable property in said county of Moultrie."

The argument of the plaintiff in error is that the indebtedness evidenced by the bonds issued by the county of Moultrie in aid of the two railroads mentioned does not fall within the exception found in section 8 of article 9 of the Constitution, and that the above recited findings of the court show that the authorized tax of seventy-five cents on the one hundred dollars would not be sufficient to pay the expenses of the county and the principal and interest on the bonds; and it is, therefore, contended that the bonds are void.

The authority cited to sustain this position (Loan Association *v.* Topeka, 20 Wall., 655) merely decides that where there is no power in the Legislature to authorize a tax in aid of the purpose for which the bonds are issued, the bonds are void.

But here it is conceded that there is power, within certain limits, to levy a tax to pay these bonds. The bonds cannot, therefore, be void. (Marcy *v.* Township of Oswego, 92 U. S., *ubi supra.*)

Moreover, it appears from the findings of the court that at the time the bonds in question were issued a levy of seventy-five cents on every hundred dollars' valuation of the taxable

property of the county would produce a sum sufficient to pay the ordinary expenses of the county and leave a surplus of over seven thousand dollars to be applied to the payment of the bonds, and that at the commencement of this suit such annual surplus, by reason of the increase in the taxable property of the county, would amount to nearly fifteen thousand dollars, a sum almost sufficient to pay the judgment rendered in this case. So that the defense now under consideration is reduced to this: that because the whole judgment cannot be at once collected, there should be no judgment at all.

But it nowhere appears in the record that the county has not ample means out of which the judgment could be collected besides its revenues derived from taxation. We know from the record that the county at one time owned eighty thousand dollars of the stock of the Decatur, Sullivan and Mattoon Railroad Company, and it does not appear that it is not still the owner of this stock, and that it may not now be subjected to the payment of the judgment recovered in this case, or that the county may not have other similar assets sufficient to pay all its debts.

Therefore, even if the county, by reason of the limit on its taxing power, could not levy a tax to pay these bonds, nevertheless, the bonds having been authorized, the holder is entitled to judgment on them, and to collect it out of any property of the county which could be subjected to the payment of its debts.

Whether the indebtedness evidenced by the bonds which are the basis of this suit falls within the exception of section 8, article 9, of the Constitution of Illinois, so that taxation for their payment is without limit, is a question which does not necessarily arise upon this record, and which we are not now required to decide.

We are of opinion that there is no valid defense against a recovery on the coupons sued on. The people of the county of Moultrie almost unanimously voted for the issue of the bonds. The conditions upon which the donations were made

were fully performed. The railroads which they were intended to aid were completed and in use before the bonds were executed. The bonds were regularly and honestly issued by the public officers charged with that duty. They are in the hands of *bona-fide* holders for value. Common honesty demands that the county should apply its available means to their payment, and there is no obstacle to a recovery upon the coupons.

Judgment affirmed. AFFIRMED.

THE TOWN OF KOSHKONONG v. OSCAR A. BURTON.

March 6, 1882.

1. Limitation under the statutes of Wisconsin to actions upon coupons of municipal bonds issued in 1857, payable twenty years after date. The cause of action upon a coupon, whether detached from the bond or not, held to accrue, and limitation to commence, from its maturity; reaffirming Amy *v.* Dubuque, 98 U. S., 471.
2. It is within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement shall be barred unless brought within a less period than that prescribed when the contract was made, or the liability incurred, from which the cause of action arose. The exertion of this power is, therefore, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law before the bar takes effect.
3. If interest upon interest, whether arising upon express or implied agreement, is allowed by the local law at the time of the contract, that right cannot be impaired by a subsequent legislative declaration as to what was, in the judgment of that department, the true intent and meaning of the statutes, prescribing and limiting the rate of interest, in force when the contract was made. The utmost effect to be given to such legislative declaration is to regard it as an alteration of the existing law in its application to future transactions.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

L. B. Caswell, for plaintiff in error.

Sleeper & Whiton, for defendant in error.

Opinion of the court.

HARLAN, J.—The object of this action, which was commenced on the 12th day of May, 1880, is to recover the amount due on bonds, with interest coupons attached, issued on the 1st day of January, 1857, by the town of Koshkonong, a municipal corporation of Wisconsin, pursuant to authority conferred by an act of the Legislature of that State. They were made payable to the Chicago, St. Paul and Fond du Lac Railroad Company, or its assigns, on the 1st day of January, 1877, at the American Exchange Bank in the city of New York, with interest at the rate of eight per cent. per annum, payable semi-annually, on the presentation of the interest warrants at that bank, on the first day of each July and January, until the principal sum should be paid. Of the bonds in suit, with their respective coupons, Burton became the owner by written assignment from the railroad company, indorsed upon the bonds, under date of November 16, 1857. None of the coupons have ever been detached from the bonds nor paid, except those maturing July 1, 1857, and January 1, 1858.

The coupons are all alike except as to dates of maturity. They are complete instruments, capable of sustaining separate actions, without reference to the maturity or ownership of the bonds. (21 How., 545, 546; 20 Wall., 583; 98 U. S., 473.) The following is a copy of the one last due: "The town of Koshkonong will pay to the holder hereof, on the 1st day of January, 1877, at the American Exchange Bank in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day. S. R. Crosby, clerk."

The main question is whether the action, as to coupons maturing more than six years prior to its commencement, is not barred by the statutes of limitation of Wisconsin. The court below being of opinion that no part of plaintiff's demands was barred, gave judgment for the principal of the bonds, with interest from the 1st day of January, 1877, at the stipulated rate of eight per cent. per annum until paid, and also for the amount of each coupon in suit, with interest from its

maturity at the rate of seven per cent. per annum, the latter being the rate established by the local law in the absence of a special agreement by the parties.

The present writ of error questions the correctness of that judgment, as well because it overrules the defense of limitation to coupons maturing more than six years before the commencement of this action, as because it allows interest upon the amount of each coupon from its maturity.

The statutes of Wisconsin in force when the bonds and coupons were issued, provided that "all actions of debts founded upon any contract or liability not under seal," (except such as are brought upon the judgment or decree of some court of record of the United States, or of a State or Territory of the United States, shall be commenced within six years after the cause of action accrued, and not afterwards; and that all personal actions on any contract, not otherwise limited by the laws of the State, shall be brought within twenty years after the accruing of the cause of action. (Rev. Stat. Wis. 1849, secs. 14 to 22, pp. 644, 665.)

We remark that the foregoing provisions, without substantial change of language, were taken from the statutes of the Territory of Wisconsin adopted in 1839. Further, that the revision of 1849 did not in terms prescribe any limitation to actions upon sealed instruments. They were, therefore, embraced by the limitation of twenty years as to personal actions on contracts not covered by other provisions.

The revision of 1849 was superseded by one made in 1858, which went into operation on the 1st day of January, 1859. By the latter, as modified by an act passed in 1861, civil actions, other than for the recovery of real property, were required to be commenced within the following periods: Actions upon judgments or decrees of courts of record of the State, and actions upon sealed instruments when the cause of action accrued in the State, within twenty years; (Rev. Stat. Wis. 1858, ch. 138, sec. 15;) actions upon the judgments or decrees of courts of record of any State or Territory of the United States

or of courts of the United States, and actions upon sealed instruments, when the cause of action accrued out of the State, within ten years; (Id., sec. 16;) and actions upon contracts, obligations, or liabilities, express or implied, excepting those mentioned in sections 15 and 16, within six years—the time to be computed, in each case, from the date when the cause of action accrued. (Gen. Laws Wis. 1861, p. 302.) The revision of 1858 also contained the general clause, that "in any case where a limitation or period of law prescribed in any of the acts hereby repealed, [which included the revision of 1849,] for the acquiring of any right or barring of any remedy, or for any other purpose, shall have begun to run, and the same or any similar limitation is prescribed in the revised statutes, the time of limitation shall continue to run, and shall have the like effect as if the whole period had begun and ended under the operation of the revised statutes." (Id., ch. 191, sec. 13, p. 1038.)

Thus stood the law of the State until the 9th day of March, 1872, a little over fifteen years after these bonds and coupons were issued, when an act was passed entitled "An act to limit the time for the commencement of action against towns, counties, cities, and villages on demands payable to bearer." It provided that "no action brought to recover any sum of money, on any *bond, coupon, interest warrant,* agreement or promise in writing, made or issued by any *town, county, city,* or *village,* or *upon any instalment of the* principal or *interest thereof,* shall be maintained in any court unless such action shall be commenced within six years from the time when such sum of money has or shall become due, when the same has been or shall be made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order: provided that any such action may be brought within *one year after this act shall take effect;* provided further, that this act shall in no case be construed to extend the time within which an action may be brought under the laws heretofore existing." (Gen. Laws Wis. 1872, p. 56.)

Opinion of the court.

Our attention has also been called to certain sections in the revision of the statutes of Wisconsin of 1878, which went into operation on the 1st day of November of that year, superseding that of 1858, as well as the act of 1872. Those sections contain, in substance, the clauses first quoted from the revision of 1858, with the modifications made by the act of 1872. (Rev. Stat. Wis. 1878, pp. 1015–16.) It is to be observed in this connection—for it has some bearing upon what we shall presently say—that section 4220 of the revision of 1878 in terms prescribed twenty years as the limitation for "an action upon a *sealed* instrument when the cause of action accrues within this State, except those mentioned in section 4222," while the latter section embraces, among others, "an action upon any bond, coupon, interest warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village, or school district in this State,"—thus indicating that the framers of the revision of 1878 regarded municipal securities for the payment of money as belonging to the class of sealed instruments. We observe, also, that the revision of 1878 contains a provision, in reference to those cases in which limitation had commenced to run, similar to that already quoted from the revision of 1858. (Rev. Stat. 1878, sec. 4984; Rev. Stat. 1858, p. 1038.)

From the foregoing summary it will be seen that by the local law, when the bonds in suit were issued, all civil actions for debt, founded on contract or liability not under seal, (except actions upon judgments or decrees of some court of record of the United States, or of a State or Territory,) could be brought within six years after the cause of action accrued, and not afterwards; while such actions, if founded on contract or liability under seal, would not be barred until twenty years after the cause of action accrued. If, as contended by plaintiff, the question of limitation is to be determined exclusively by the revision of 1849, in force when the bonds were issued, and if, as is further insisted, an action on municipal bonds and coupons, such as are here in suit, is, within the meaning of that

revision, "founded on contract or liability not under seal," it is clear that, without reference to the statute of 1872, this action is barred as to all coupons maturing more than six years before its commencement, whether such coupons were separated or not from the bonds to which they were originally attached. This upon the authority of Amy *v.* Dubuque, 98 U. S., 470, with the doctrines of which we are entirely satisfied. We there said, construing the statutes of Iowa upon the subject of limitation, that suits upon unpaid coupons, such as those in suit, might be maintained in advance of the maturity of the principal debt; that "upon the non-payment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. * * * * Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment, could not prevent the statute from running."

But we are inclined to the opinion, although uninformed upon the subject by any direct decision of the Supreme Court of the State to which our attention has been called, that municipal bonds and coupons were regarded by the framers both of the revision of 1849 and that of 1858 as, alike, sealed instruments to which the limitation of twenty years was applicable. The word bond at common law—and even now as a general rule—imports a sealed instrument. And although, under some circumstances, a municipal corporation issuing and delivering bonds and coupons in aid of railroad enterprises may be liable thereon notwithstanding they are unattested by its corporate seal, we are satisfied that the Legislature of Wisconsin intended, by the revision of 1849, as well as that of 1858, to prescribe the same limitation for actions upon such obligations as was in terms prescribed for actions upon what technically, or in common legal parlance, are denominated sealed instruments.

If this interpretation of the revision of 1849 and 1858 be

correct, it would follow that this action was not, at the passage of the act of 1872, barred by limitation as to any of the coupons in suit. Twenty years had not then expired from the maturity of any of them.

It remains now to inquire as to the effect of the act of 1872 upon municipal obligations executed and outstanding at the date of its passage. Of the object of that statute there cannot, it seems to us, be any reasonable doubt. The specific reference to coupons and interest warrants made or issued by towns, counties, cities, and villages without distinguishing such as are sealed from those unsealed, and the express requirement as to the time within which actions thereon must be brought or be barred, indicates a purpose upon the part of the Legislature to reverse the policy which had been pursued by holders of such securities of postponing the collection of interest coupons until after the bonds to which they were annexed had matured—a delay which had the effect, in some instances, of compelling municipal corporations to meet all at once a large indebtedness which the Legislature intended, at least as to the interest accruing thereon, should be provided for in instalments or through a series of years. Whatever considerations, however, may have suggested that legislation, it is clear that its object was such as we have indicated.

We are here met with the argument that the act of 1872 neither in terms nor by necessary implication applies to any municipal obligations except those "payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order;" whereas the bonds in suit are payable to the railroad company *or its assigns*, and the coupons are payable to the *holder* thereof. Waiving any expression of opinion as to whether the phrases "payable * * * to the order of some person," or "payable * * * to some person or his order," do not, upon a reasonable construction of the act, embrace the case of a bond payable to a railroad company or its assigns—a question which need not be determined, since it is conceded that the action as to the principal of the bonds

is not, in any view of the case, barred by limitation—we are of opinion that a coupon payable to the holder thereof is, within the meaning of the act and according to the usages of the commercial world, payable to bearer. Consequently the suit, as it respects interest coupons, is embraced by the terms of the act of 1872.

But the further contention of plaintiff's counsel is that the act of 1872 is unconstitutional as impairing the obligation of the contract between the town and the holders of its securities. This objection is founded upon the proviso which declares that "any such action [of the class specified in the act] may be brought [only] within one year" after the act takes effect. While that proviso is very obscurely worded, its meaning is that no action to recover money due upon a municipal bond, coupon, interest warrant, or written agreement or promise, or upon any instalment of the principal or interest thereof, whether such obligations were issued before or after the passage of the act, should be maintained unless brought within six years (not from the passage of the act, but) from the time the money sued for became due; except—and no other exception is made—that when the six years from the maturity of any past-due bond or coupon would expire within less than a year after the act passed, the action should not be debarred if brought within that year. It was undoubtedly within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. (Terry *v.* Anderson, 95 U. S., 633; Hawkins *v.* Burney, 5 Pet., 457; Jackson *v.* Lamphire, 3 Pet., 280; Sohn *v.* Waterson, 17 Wall., 996; Christmas *v.* Russell, 5 Wall., 290; Sturges *v.* Crowningshield, 4 Wheat., 122; Osborne *v.* James,

17 Wis., 576; Parker v. Kane, 4 Id., 1; Falkner v. Donman, 7 Wis., 393.) Whether the first proviso in the act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand; and we think it is not. For if the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before the bar takes effect, and is, therefore, unconstitutional as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire act would fall and become inoperative. The result, in such case, would be that the plaintiffs and other holders of the coupons would have not simply one year, but—under the construction we have given to the statutes in force prior to the act of 1872—to a reasonable time after its passage within which to sue. And if a proper construction of that act would give the full period of six years after its passage within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained; for this action was not instituted until more than eight years after the passage of the act of 1872. It is consequently barred by limitation as to all coupons falling due (and, therefore, collectible by suit without reference to the maturity of the bonds) more than six years prior to its commencement. The bar was complete more than six years before the revision of 1878 took effect, even if that revision should be deemed to have any application to this action. There is no escape from this conclusion, unless we should hold that the Legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But neither upon principle nor authority could that position be sustained.

The question next to be considered relates to that portion of the judgment allowing interest upon the amount of each coupon from its maturity.

Opinion of the court.

The general proposition suggested by this question seems to have been determined, in 1865, in Mills *v.* Town of Jefferson, 20 Wis., 56. That was a suit upon interest coupons attached to bonds issued by a municipal corporation to a railroad company, under the authority of an act passed in the year 1857. The coupons were similar to those here in suit. While recognizing the fact that many courts of high authority had disallowed interest upon interest, the Supreme Court of Wisconsin expressed its approval of those cases in which it was adjudged that an express agreement in a note or bond to pay interest at a specified time, as annually or semi-annually, entitled the holder to interest upon interest from the time it became due. "For," said the court, "when a person agrees to pay interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest upon interest from the time he should have made the payment? If he undertakes to pay in a sum at a given time to the owner, and makes default, the law allows interest on the sum wrongfully withheld from the time he should have made such payment." To the same effect is Pruyn *v.* The City of Milwaukee, 18 Wis., 367, where, without question, so far as we can gather from the report of the case, interest upon interest was given upon the amount of coupons from their respective maturities. We remark, in this connection, that among the authorities cited by the State court in 20 Wisconsin, 56, in support of its conclusion is Gelpcke *v.* City of Dubuque, 1 Wall., 175, where it was said—the suit being upon coupons of municipal bonds—that "if the plaintiffs recover in this case they will be entitled to the amount specified in the coupons, with interest and exchange as claimed." In harmony with this view are Aurora *v.* West, 7 Wall., 105; Town of Genoa *v.* Woodruff, 92 U. S., 502; Amy *v.* Dubuque, 98 U. S., 471; Walnut *v.* Wade, 103 U. S., 696.

Another question arises upon this branch of the case. The law of Wisconsin as declared in Mills *v.* Town of Jefferson remained, without attempt to change it, until March 3, 1868, when an act was passed entitled 'An act to construe sections

1 and 2 of chapter 160 of the General Laws of 1859, and to amend section 2 of said chapter." Its first and second sections are as follows:

"1. It was and is the true intent and meaning of sections 1 and 2 of chapter 160 of the general laws passed in the year 1859, and of all other laws heretofore enacted in the State prescribing and limiting the rate of interest, that interest should not be compounded or bear interest upon interest, unless an agreement to that effect was clearly expressed in writing, and signed by the party to be charged therewith.

"2. Section 2 of chapter 160 of the General Laws of 1859 is hereby amended by adding thereto the following: 'And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest.'" (Gen. Laws Wis. 1868, pp. 62, 63.)

In the Revised Statutes of 1878 the following provision appears:

"SEC. 1689. * * * * And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

It is contended that the foregoing enactments govern the present case, and preclude recovery of interest upon the amount of the respective coupons from their maturities. In this view we do not concur. By the first section of the act of 1868 the Legislature assumed to declare what was the true intent and meaning of previous legislation prescribing and limiting the rate of interest. It was said by Chancellor Walworth in Salters *v.* Tobias, 3 Paige, 344, that "in England, where is no constitutional limit to the powers of Parliament, a declaratory law forms a new rule of decision, and is valid and binding upon the courts, not only as to cases which may subsequently occur, but also as to pre-existing and vested rights. But even

then the courts will not give it a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it." When counsel, in Ogden *v.* Blackledge, 2 Cr., 276, announced that to declare what the law is or has been is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point. Prior to the passage of the act of 1868, the highest judicial tribunal of the State had adjudged that when a sum was to be paid at a specified time as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law in that class of cases. And the utmost effect to be given to a subsequent legislative declaration as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, especially where, as was the case in the act of 1868, that declaration was accompanied by a distinct provision in terms changing the pre-existing law. In Stockdale *v.* Insurance Co., 20 Wall., 331, this court, speaking by Mr. Justice Miller, said that, "both on principle and authority, it may be taken to be true that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in reference to all trans-

actions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated." (Sedgwick on Constr. Stat. and Const. Law, 2d ed., pp. 227, 214; Cooley's Const. Lim., 93, 94.) It is clear, therefore, that neither the act of 1868 nor the provision quoted from the revision of 1878, which is but a continuation of the second section of the act of 1868, can be deemed applicable to the case before us. The contract between the town and the holders of its securities was entered into prior to those enactments, and the rights of the parties must necessarily be determined by the law as it was when the contract was made. It was not within the constitutional power of the Legislature to take from the plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right under the law of the State.

Without pursuing the case further, it is sufficient to say that we do not concur with such of the views of the learned district judge as are inconsistent with those here announced. The judgment is reversed, with directions to enter judgment in behalf of plaintiff for the amount of the bonds, with interest at the stipulated rate from their maturity until paid, (Spencer *v.* Maxfield, 16 Wis., 185; Pruyn *v.* The City of Milwaukee, 18 Wis., 367,) and also for the respective amounts of those coupons only which fell due within six years preceding the commencement of this action, with interest thereon at the rate established by the law of the State. It is so ordered.

REVERSED.

AMELIA BENNECKE v. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

March 13, 1882.

1. Waivers of stipulations in agreements, and ratifications of previous unauthorized acts of an agent by a principal, must, to be effectual, not only be made intentionally, but with knowledge of the circumstances.

Statement of the case.

2. Hence, where a party insured went south of a forbidden latitude and died, and the agent of the company, hearing of his departure, went, after his death, but whilst ignorant of it, to a relation of the insured, and persuaded him to apply and pay for a permit, and gave him a receipt therefor, and forwarded the money to the principal office of the company, and requested a permit, which was never received, and, eleven days after hearing of the death of the insured, tendered back the premium, *held* that these facts did not constitute a waiver of the forfeiture by the company.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit brought by Amelia Bennecke, plaintiff in error, who was also plaintiff in the court below, to recover of the Connecticut Mutual Life Insurance Company the sum of two thousand dollars upon a policy of life insurance.

The parties having waived a jury, the issues both of fact and law were submitted to the court, which made a special finding, from which the following facts appeared:

On January 29, 1878, Adolphe Bennecke procured from the Connecticut Mutual Life Insurance Company, through John Ansley, its agent at Bloomington, Illinois, a policy of insurance on his life for two thousand dollars, for the benefit of Amelia Bennecke, his wife. It was an ordinary life policy, and contained, among other conditions, the following:

"3d. That the said insured is under this policy freely permitted to reside in any civilized abode in the western hemisphere lying north of the thirty-second parallel of north latitude in the United States, and lying south of said thirty-second parallel, excepting from the first day of July to the first day of November, and in the eastern hemisphere lying north of the forty-second parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich, and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits; but if he shall at any time during the continuance of this policy pass beyond or be without the foregoing limits without the

consent of this company previously given in writing, in each or either of the foregoing cases, then this policy shall become and be null and void.

"4th. That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect to the same shall be forfeited to the company."

After the signatures of the secretary and vice-president of the company, and on the margin at the bottom of the policy, appears the following:

☞ "Agents of the company have no authority to make, alter, or change any condition of the policy, nor to waive forfeiture thereof."

The annual premium of forty-six dollars and twenty-four cents required by the terms of the policy was duly and fully paid.

Bennecke left his home at Bloomington, Illinois, on September 26, 1878, and went to New Orleans, Louisiana, which is south of the thirty-second parallel of latitude, without the consent of the insurance company first obtained. He remained there until October 15, 1878, when he died at the hospital Hotel Dieu, in that city, of yellow fever.

Ansley had been agent of the Connecticut Mutual Life Insurance Company at Bloomington, Illinois, from 1863, up to and including October, 1878. On October 16, 1878, he first heard that Bennecke had gone to New Orleans. On October 17 Ansley called on Haker, the assured's brother-in-law; told him that he had heard that Bennecke was then in New Orleans; that on account of this violation of the condition of the policy his insurance was forfeited; that a southern permit, costing twenty dollars, should be paid for, and advised him to pay it for Bennecke. Haker at first said he knew nothing about it, and refused to pay the twenty dollars. He then said he would look into the matter. The same day, after a consultation with Mrs. Bennecke, Haker went to Ansley's office and paid him twenty dollars, and took from him a receipt, as follows:

Statement of the case.

"AGENCY AT BLOOMINGTON, ILL.,

"$20. "*Oct.* 17, 1878.

"Received from Christ. Haker twenty dollars, being the amount required for a southern permit on policy of Adolphe Bennecke in the Connecticut Mutual Life Insurance Company of Hartford, Conn., No. 52,242.

"Amount of policy, $2,000. "JOHN ANSLEY, *Agent.*"

At the time of taking this receipt neither Haker nor Ansley, nor Bennecke's wife or friends, knew that Bennecke was dead.

On receiving the twenty dollars from Haker, Ansley forwarded the money to Stearns, Dickinson & Co., the State agents of the insurance company, at Chicago, Illinois, and they acknowledged the receipt of the money by letter.

Ten dollars per thousand was the customary price fixed by the company as the extra premium for a permit to go south of the thirty-second parallel between the first of July and the first of November. Ansley recollected having received money for three or four such permits, possibly more, at that rate. In such cases he simply received the money for the permits, forwarded it to the State agents of the insurance company at Chicago, and requested them to get permits from the insurance company at Hartford, Connecticut, and send them to him for delivery. The letter in which he inclosed the twenty dollars received from Haker to the agency at Chicago, was as follows:

"AGENCY AT BLOOMINGTON, *Oct.* 17, 1878.

"Messrs. STEARNS, DICKINSON & Co.

"GENTS: Herein please find draft for $20, less ex., for which please get and send me a southern permit for A. Bennecke, insured by policy 52,242; amount $2,000. He went to New Orleans about ten days ago, and will probably remain there during the balance of the month. Please give this immediate attention, and get permit here as soon as possible. This twenty dollars paid this day.

"Yours truly, JOHN ANSLEY."

Ansley never received a permit from the insurance company for Bennecke. On the 6th of November, 1878, Ansley hav-

ing become satisfied that Bennecke was dead at the time the twenty dollars was paid him for the permit, of his own motion took twenty dollars of other money belonging to the company and tendered it to Haker, stating that Bennecke was dead at the time the money was paid as a reason for tendering the money to him. Haker refused to receive the money. Ansley had no authority to issue policies of insurance on the company, but after the policies were issued he turned them over to the parties on payment of the premium. Ansley received no word from the company or State agents about Bennecke's death up to the time he tendered the money back to Haker. On the 26th of October he addressed a letter to the State agents of the insurance company at Chicago, in which he informed them that Bennecke had died on October 17, in New Orleans, of yellow fever. From all that appears this was the first information received by them of Bennecke's death.

Ansley knew what was the price required for a permit, and had never applied for one without getting it. But he never applied for one when yellow fever was prevailing in the forbidden region. Proofs of loss, dated the 6th of December, 1878, were furnished the insurance company. The defendant company on the trial offered to return the money received by Ansley for the permit.

Suit on the policy was begun in the Circuit Court of McLean county on the 18th day of April, 1878, by a declaration on the policy of the insurance. Defendant filed a plea of the general issue only. On the petition of the defendant the case was transferred to the Circuit Court of the United States for the Southern District of Illinois. It was admitted by the insurance company that there was no other defense in the case than what arose from the forfeiture of the policy by reason of the fact that Bennecke had gone south of the thirty-second parallel of latitude between the first of July and the first of November, without the consent of the company previously given in writing; and on the foregoing facts it occurred as a question whether the forfeiture had been waived by the company, on which ques-

tion the judges were opposed, and the presiding judge being of opinion that the forfeiture had not been waived, judgment was entered for the defendant.

Whereupon, and on motion of the defendant, by its counsel, it was ordered that the state of the pleadings and the facts found and the question on which the judges differed be certified, according to the request of the defendant and the law in that case made and provided, to this court to be finally decided.

The cause has accordingly been brought to this court by certificate of division of opinion and writ of error.

William A. McKenney, for plaintiff in error.

Edward S. Isham, for defendant in error.

WOODS, J.—It is not disputed by plaintiff in error that upon the facts found the policy of insurance had been forfeited. It is not insisted that there was any formal waiver of the forfeiture by any agent of the defendant in error, or that any permit was ever issued by the company to Bennecke, from which such waiver could be inferred.

But plaintiff in error contends that the receipt by Ansley, the agent of the insurance company at Bloomington, on October 17, after the forfeiture of the policy, of the sum usually charged for a permit to reside south of the thirty-second parallel between the first of July and the first of November, the sending of the money by him on the same day to the agents of the company at Chicago, its receipt by them, and the fact that they never returned the money to the person by whom it was paid, are sufficient to establish a waiver by the company of the forfeiture of the policy.

It does not appear from the findings of fact made by the court that either Ansley, the agent at Bloomington, or Stearns, Dickinson & Co., the agents at Chicago, had any direct authority to waive a forfeiture. But even if it were shown that they had such authority, and had waived the forfeiture, or

that the company itself had waived it, the waiver would not, under the circumstances of this case, be binding on the company.

A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding. (Darnley (Earl) *v.* L. C. & Dover Ry. Co., Law Rep., 2 H. L., 43.)

The same rule applies to the ratification by the principal of the unauthorized acts of his agent.

"It is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent." (Combs *v.* Scott, 12 Allen, 496.)

And it has been declared by this court that "no doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud." (Owings *v.* Hale, 9 Pet., 607; Diehl *v.* Insurance Co., 58 Penn. St., 452;

Bevin *v.* Conn. Mutual Life Ins. Co., 23 Conn., 244; Viall *v.* The Genesee Mut. Ins. Co., 19 Barb., 440.)

There is no pretense in this case that the insurance company was advised of the material facts when its supposed waiver and ratification of the acts of its agent took place. The contention of the plaintiff in error is that the insurance company waived a forfeiture of the policy when it was totally ignorant that any forfeiture existed. And the waiver of the forfeiture is deduced from a permit which is itself deduced from the fact that an agent, himself ignorant of the material facts, agreed to apply to the company for the permit, and received and forwarded the money to pay for it.

The very purpose for which a permit was asked shows that both parties were ignorant of the facts which it was necessary the company and its agents should understand before any effect could be given to its alleged waiver of the forfeiture. Permission was asked that Bennecke might reside and travel south of a certain parallel. This implied that he was living and able to travel. But the findings show he was dead when the permit was applied for. If the company had given him a formal permit in writing to reside and travel south of the thirty-second parallel, he being dead at the time, and the company ignorant of the fact, it would be a complete *non sequitur* to hold that this amounted to a waiver of a forfeiture of the policy unknown to the company, and consequent upon his doing the act for which a permit was asked, and which was in violation of a condition of the policy.

The case may be thus stated: The right of the plaintiff in error to recovery rests on a waiver by the insurance company of the forfeiture of the policy. But there has been no direct waiver. The waiver is deduced from the permit. But there has been no formal permit. The permit is inferred from the fact that Ansley, a local agent, who had no knowledge of the death of Bennecke, applied for a permit to other agents who were also ignorant of the death of Bennecke, and remitted to them the money therefor, which they retained, but which

Ansley tendered back, using for the tender other moneys of the company; the company itself, the principal of these agents, being all the time ignorant that Bennecke had forfeited his policy by a violation of its conditions, or that he had died in consequence of such violation, or that after his death a permit to allow him to reside and travel in the forbidden region had been applied for, or that any money had been handed to its agent to be paid over as the consideration for such permit.

The case of the plaintiff in error is not aided by the facts found by the court in relation to the retention by the agents of the company of the money paid for the permit. It is unnecessary to decide what inference might be drawn if the company or its agents, with full knowledge of the death of Bennecke, had retained the money and never tendered it back. It does not appear that Ansley was informed of the death of Bennecke until October 26. On November 6, eleven days thereafter, he tendered back to Haker the money advanced by him to pay for the permit. Under the circumstances of this case we do not think this lapse of time sufficient to show that Ansley intended to waive the forfeiture of the policy, even if he had been clothed with authority to do so.

If the company was bound by the act of Ansley in receiving the money for the permit, it was entitled to the benefit of his act in tendering it back. One tender was sufficient. That made by Ansley was never disavowed by the company. On the contrary, the company renewed it upon the trial of the cause in the Circuit Court.

Under the circumstances of this case, the contention that the insurance company waived the forfeiture of the policy is without support.

The judgment entered in the Circuit Court in favor of the defendant, in accordance with the opinion of the presiding justice, was therefore right, and must be affirmed.

AFFIRMED.

WILSON AGER AND ELISHA C. AGER v. TALBOT C. MURRAY.

March 6, 1882.

patent right may be subjected by bill in equity to the payment of a judgment debt of the patentee.

APPEAL from the Supreme Court of the District of Columbia.

Warwick Martin and *T. T. Crittenden*, for appellants.

L. G. Hine and *S. T. Thomas*, for appellee.

GRAY, J.—This is a bill in equity by a judgment creditor to object to the payment of his debt the interest of his debtor in patent rights. The case was heard in the Supreme Court of the District of Columbia upon bill and answers, by which it appears to be as follows:

On the 10th of April, 1876, Talbot C. Murray, in an action at law upon a promissory note, recovered judgment against Wilson Ager for the sum of $2,164.66, with interest and costs. Upon that judgment a writ of *fieri facias* was issued, and returned *nulla bona*. Wilson Ager had no real or personal property in the district subject to execution at law, but was the owner of sundry letters-patent issued to him by the United States for useful inventions, which, if sold, would produce more than enough money to satisfy that judgment. On the 6th of September, 1876, he conveyed all his right and interest in these letters-patent to the other defendant, Elisha C. Ager, who owned an equitable interest of one-third therein, and who, on the 18th of October, 1877, reconveyed the patent rights to Wilson by an assignment which was not recorded in the Patent Office. Wilson Ager resides in the District of Columbia, and the other defendant resides in the State of California, and both have appeared in the cause and answered to the merits of the bill.

The bill prays for an injunction against further assignment pending the suit, and that the patents be sold under the direction of the court, and the proceeds of the sale be applied to

the payment of the judgment debt, and the defendant Wilson Ager be required to execute such assignment as may be necessary to vest title in the purchaser or purchasers in conformity with the patent laws, and for further relief. The decree is, that in default of his paying by a certain day the judgment mentioned in the bill, with interest and costs, and the costs of this suit, the patent rights be sold and an assignment thereof executed by him as prayed for, and that in default of his executing such assignment, some suitable person be appointed trustee to execute the same.

From that decree the original defendants have appealed to this court; and the single question argued before us is whether a patent right may be ordered by a court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee.

A patent or a copyright which vests the sole and exclusive right of making, using, and vending the invention, or of publishing and selling the book, in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property capable of being assigned by him at his pleasure, although his assignment, unless recorded in the proper office, is void against subsequent purchasers or mortgagees for a valuable consideration without notice. (Rev. Stats., secs. 4884, 4898, 4952, 4955.) And the provisions of the patent and copyright acts securing a sole and exclusive right to the patentee do not exonerate the right and property thereby acquired by him, of which he receives the profits and has the absolute title and power of disposal, from liability to be subjected by suitable judicial proceedings to the payment of his debts.

In England it has long been held that a patent right would pass by an assignment in bankruptcy, even without express words to that effect in the bankrupt act. (Hesse *v.* Stevenson, 3 Bos. & Pul., 565; S. C. Davies Pat. Cas., 263; Longman *v.* Tripp, 2 New Rep., 67; Bloxan *v.* Elsee, 1 Car. & P., 558; S. C. Ry. & Mood., 187; 6 B. & C., 169; 9 D. & R., 215; Maw-

nan *v.* Tegg, 2 Russ., 385; Edelsten *v.* Vick, 11 Hare, 78; Hudson *v.* Osborne, 39 Law Jour. (N. S.) Ch., 79.) In Hesse . Stevenson, Mr. Justice Chambre, in the course of the argunent, said: "The right to the patent is made assignable; why, hen, may it not be assigned under a commission of bankrupt?" 3 Bos. & Pul., 571.) And Lord Alvanley, delivering the unanmous judgment of the court, after observing that it was conended "that the nature of the property in this patent was such hat it did not pass under the assignment," and "that although ›y the assignment every right and interest and every right of ıction, as well as right of possession and possibility of interest, s taken out of the bankrupt and vested in the assignee, yet hat the fruits of a man's own invention do not pass," said: 'It is true that the schemes which a man may have in his own ıead before he obtains his certificate, or the fruits which he may nake of such schemes, do not pass, nor could the assignee re-ıuire him to assign them over, provided he does not carry his ıchemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby ıcquire a beneficial interest, which may be the subject of as-ıignment, I cannot frame to myself an argument why that .nterest should not pass in the same manner as any other prop-ɔrty acquired by his personal industry." (3 Bos. & Pul., 577, 578.) The recent bankrupt act of the United States, in defin-.ng what property should vest in the assignee in bankruptcy, expressly enumerated "all rights in equity, choses in action, patent rights and copyrights," and required the assignee to sell all the property of the bankrupt for the benefit of his creditors. (Rev. Stats., secs. 5046, 5062–5064.) The only difference is that in England all such rights pass that become vested in the bankrupt before he obtains a certificate of discharge, whereas here only those rights pass which belong to him at the time of the assignment.

It has been said by an English text writer that "a patent right may be seized and sold in execution by the sheriff under a *fieri facias*, being in the nature of a personal chattel." (Web-

ster on Patents, 23.) We are not aware of any instance in which such a course has been judicially approved. But it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor which, by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation, or of choses in action. (McDermutt *v.* Strong, 4 Johns. Ch., 687; Spader *v.* Hadden, 5 Johns. Ch., 280, and 20 Johns., 554; Edmeston *v.* Lyde, 1 Paige, 637; Wiggin *v.* Heywood, 118 Mass., 514; Sparhawk *v.* Cloon, 125 Mass., 263; Daniels *v.* Eldredge, 125 Mass., 356; Drake *v.* Rice, 130 Mass., 410.)

In Stephens *v.* Cady, 14 How., 528, and again in Stevens *v.* Gladding, 17 How., 447, the point decided was that by a sale of the copperplate engraving of a map on execution from a State court against the owner of the copyright, the purchaser acquired no right to strike off and sell copies of the map.

Mr. Justice Nelson, in delivering judgment in Stephens *v.* Cady, said: "The copper-plate engraving, like any other tangible personal property, is the subject of seizure and sale on execution, and the title passes to the purchaser the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of creditors." He then cited the cases in Johnson's and Paige's Reports, above referred to, and added: "But in case of such remedy, we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copy-

ight act, in order to vest him with a complete title to the prop-
rty." (14 How., 531.)

In Stevens *v.* Gladding Mr. Justice Curtis said: "There vould certainly be great difficulty in assenting to the propo-ition that patent and copy rights, held under the laws of the Jnited States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 Howard, 531, t may be added that these incorporeal rights do not exist in iny particular State or district; they are co-extensive with the United States. There is nothing in any act of Congress, or in he nature of the rights themselves, to give them locality any-where, so as to subject them to the process of courts having urisdiction limited by the lines of States and districts. That in execution out of the Court of Common Pleas for the county of Bristol, in the State of Massachusetts, can be levied on an neorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That by the levy of such an execution :he entire right could be divided, and so much of it as might ɔe exercised within the county of Bristol sold, would be a posi-:ion subject to much difficulty. These are important questions, ɔn which we do not find it necessary to express an opinion, ɔecause in this case neither the copyright, as such, nor any part ɔf it, was attempted to be sold." (17 How., 451.) The difficulties of which the learned justice here speaks are of seizing and selling a patent or copy right upon an execution at law, which is ordinarily levied only upon property, or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are *in personam*, and may be enforced in all cases where the person is within its jurisdiction. (Massie *v.* Watts, 6 Cranch, 148.) And the terms in which he refers to the statement of Mr. Justice Nelson show that there was no intention to criticise or qualify that statement.

There are, indeed, decisions in the Circuit Courts that an assignee in insolvency, or a receiver of all the property of a

debtor, appointed under the laws of a State, does not by virtue of the general assignment or appointment merely, without any conveyance made by the debtor or specifically ordered by the court, acquire a title in patent rights. (Ashcroft *v.* Walworth, 1 Holmes C. C., 152; Gordon *v.* Anthony, 16 Blatchf. C. C., 234.) But in Ashcroft *v.* Walworth Judge Shepley clearly intimated that the courts of the State might have compelled the debtor to execute such a conveyance; and the highest courts of New York and California have affirmed the power, upon a creditor's bill, to order the assignment and sale of a patent right for the payment of the patentee's judgment debts. (Gillette *v.* Bate, 86 N. Y.; Pacific Bank *v.* Robinson, 57 Cal.)

In Carver *v.* Peck, 131 Mass., 291, the court reserved the expression of any opinion upon that question, because unnecessary to the decision. And the assumption in Cooper *v.* Gunn, 4 B. Monroe, 594, that an author could not be deprived, against his will and in favor of any of his creditors, of any of the rights secured to him by the copyright acts, was merely *obiter dictum*, unsupported by reasoning or authority.

In the case at bar the bill is filed by a judgment creditor of the patentee, in a court of the United States of appropriate jurisdiction, against the patentee, residing within the district and holding the entire legal title and two-thirds of the equitable interest in the patent rights, and against the owner of an equitable interest in the remaining third, who is properly made a party to the bill. Both defendants are before the court and have filed answers. The debtor's interest in the patent rights is property assignable by him, and which cannot be taken on execution at law. The case is thus brought directly within the opinion delivered by Mr. Justice Nelson in Stephens *v.* Cady, of the soundness of which we entertain no doubt.

The clause of the decree below, appointing a trustee to execute an assignment if the patentee should not himself execute one as directed by the decree, has not been objected to in argument, and was clearly within the chancery powers of the court as defined in the statute of Maryland of 1785, which is in force

Syllabus.

in the District of Columbia. (Maryland Stat. 1785, c. 72, secs. 7, 13, 25, 2 Kilty's Laws; Laws of District of Columbia, ed. 1868, pp. 326, 328, 333, 336.)

Decree affirmed. AFFIRMED.

G. A. SCOVILL AND THOMAS H. ANNABLE, ASSIGNEES IN BANKRUPTCY OF THE FORT SCOTT COAL AND MINING COMPANY, v. NATHANIEL THAYER.

March 13, 1882.

1. When the amount of the capital stock of an incorporated company is limited by its charter, all stock issued in excess of the limit is unauthorized and void.
2. A holder of such unauthorized stock is not entitled to any of the rights, or subject to any of the liabilities, of a holder of authorized stock.
3. Holders of such unauthorized stock are not estopped to set up its invalidity as a defense to an action in the interest of creditors brought against them, to recover the balance unpaid thereon, by the fact that they attended the meeting at which it was voted to issue the same, or that they received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock.
4. When the company which has issued stock beyond the limit prescribed by its charter has been adjudicated bankrupt, the holders of the unauthorized stock are not entitled to have money paid thereon applied as a credit on the unpaid balance due on the authorized stock held by them.
5. Subscribers to the stock of an incorporated company paid twenty per cent. on their shares, and it was agreed between them and the company that no further assessments should be made thereon, and certificates for full-paid shares were issued to them. The company was adjudicated bankrupt, and it became necessary to assess the unpaid stock to satisfy claims of creditors of the company: *Held*—

   1. That the agreement between the company and its stockholders was in equity void as to creditors.

   2. That before an action at law could be maintained by the assignees in bankruptcy against a stockholder to recover upon his unpaid subscription of stock, some proceeding in the interest of creditors in a court of competent jurisdiction, to set aside the agreement between the stockholders and the company, and to make an assessment upon such unpaid stock, was necessary.

Statement of the case.

3. That until such order of the court and assessment, or some authorized demand upon the stockholder to pay the balance due on the stock, no cause of action accrued against him in favor of the assignees, and the limitation prescribed by the second section of the bankrupt act did not begin to run in his favor.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

On November 25, 1870, the Fort Scott Coal and Mining Company was organized as a corporate body under the general laws of the State of Kansas, with a capital stock of one hundred thousand dollars.

According to the laws of that State any corporation might increase its capital stock to any amount not exceeding double its authorized capital.

Under the provision of this law the corporation, on April 19, 1871, increased its capital stock from one hundred thousand to two hundred thousand dollars. On October 16, 1872, the corporation attempted, by taking the steps required by law for the lawful increase of stock, to increase its capital stock to three hundred thousand dollars, and on December 27, 1872, to make a further increase of one hundred thousand dollars. The nominal capital was thus raised to the sum of four hundred thousand dollars.

Nathaniel Thayer, the defendant in error, who was a holder of shares in the company, attended by proxy the meetings of the stockholders at which the third and fourth issues of stock were voted. After this attempted increase of the stock the officers and agents of the company, by advertisements, billheads, and verbally, represented that its capital stock was four hundred thousand dollars.

Thayer was the holder of two hundred and eighty-five shares of the first two issues of stock. On two hundred of these shares he had paid to the company twenty dollars per share, and on the remaining eighty-five he had paid forty dollars per share. He was also the holder of five hundred and eighty-five shares of the third and fourth issues, upon which he had paid the

company fifty dollars per share. No other payments were ever made by him on his shares of stock.

The other stockholders paid the same amounts on the shares of stock of the several issues held by them respectively. By agreement made at the date of the several issues of stock the amounts paid thereon were credited to the subscribers, and the balance unpaid credited by "discount," and certificates as for full-paid shares were delivered to the subscribers, and the stock account between the company and them balanced by such "discount."

On April 2, 1874, a petition in bankruptcy was filed against said company in the United States District Court for the District of Kansas, on April 11 the company was adjudicated a bankrupt, and on April 29 the plaintiffs in error were appointed its assignees. On March 31, 1876, the assignees filed their petition in the bankruptcy court, wherein they prayed for an order of the court directing them to make an assessment and call upon the unpaid stock of the company for the purpose of paying its debts.

In their petition the assignees represented as follows:

"At the date of adjudication in bankruptcy the affairs of said company were in a very embarrassed and complicated condition, and much time has been necessarily consumed and considerable expense incurred in opposing claims attempted to be established in said bankrupt court for failures on the part of said company to comply with contracts made by it. Many fraudulent claims for large amounts have been filed against said bankrupt, requiring time to oppose and defeat, which have been defeated. The litigated claims are now reduced to a small number, not covering more than ten thousand six hundred and one dollars and eighty cents. The property of the company on hand at the date of adjudication in bankruptcy has been disposed of as rapidly as seemed conducive to the interests of all concerned. The sale of a portion of the real estate has been delayed in the hope that the demand for land would increase and your petitioners realize something out of

it for the benefit of the creditors. Your petitioners believe, however, that any further delay in the disposal of the bankrupt's property would not be advantageous.

"Your petitioners had intended before making this application to have fully closed up the contest over litigated claims, disposed of assets of the company, and collected all its bills receivable, but find it is impossible to accomplish it without a longer postponement than is convenient or expedient."

The petition further averred that "the amount of the liabilities of the bankrupt over and above the assets is $124,684, while the amount yet due and unpaid on the stock held and owned by said stockholders is $222,650."

By an amendment to their petition, the assignees represented as follows: "that an assessment of seventy-six per cent. upon the par value of each share of stock in said company, if credited with the amount paid each stockholder heretofore, would equalize the burden upon the stockholders, and also bring into the hands of your petitioners a sufficient amount to pay the debts of the company."

Upon the filing of this petition the court made an order that all the stockholders of the bankrupt company show cause on April 21, 1876, why the assessment and call prayed for in said petition should not be made, and that the assignees cause a copy of the order to show cause to be mailed to each stockholder at his usual place of residence and address, and also give notice by publication in the Fort Scott Daily Monitor, for at least ten days before the said April 21, 1876.

By order of the court, the hearing of the rule was postponed to June 10, 1876. R. S. Watson, a stockholder, had in the meantime filed exceptions to the rule, on behalf of himself and all other stockholders desiring to avail themselves thereof. On the date last named, the petition and amended petition of the assignees, and the exceptions thereto, came on for hearing, whereupon the court overruled the exceptions, and decreed that an assessment and call be made upon the stock of the company of seventy-six per cent., upon which should be cred-

ited to each stockholder any sums paid by him on his shares, and that the sum so assessed should be paid to the assignees on or before August 1, 1876, and in default of payment the assignees were directed to sue for and collect the same.

On July 17, 1876, the assignees made an assessment and call upon the stockholders as authorized by the order and decree of the District Court, and gave notice thereof to the stockholders, but before the assessment could be collected Watson, the stockholder before mentioned, filed with the circuit judge a petition for the reversal of the order and decree of the District Court authorizing the assessment and call.

It does not appear from the record upon what day this petition was filed. But on December 4, 1876, the decision of the circuit judge thereon was transmitted to the District Court. The circuit judge affirmed the decree of the District Court, "with this modification: that the said District Court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock in ninety days from this twenty-ninth day of November, 1876, a credit on his or her proportion of the amount so assessed as was included in said assessment for the purpose of paying the costs of enforcing by suit the collection of said assessment."

The District Court, on December 4, 1876, entered a decree in conformity with the order of the circuit judge.

Thayer, the defendant in error, having failed to pay within the time limited by the court the assessment made upon him on account of his stock, although served with notice to do so, the assignees, on April 9, 1877, brought against him, in the Circuit Court of the United States for the District of Massachusetts, an action at law to recover the sum of $27,160, which was the amount of the assessment on his unpaid stock.

The declaration alleged in substance the facts above recited.

The defendant in error filed two pleas, the first of which was a general denial of the allegations of the declaration, and the second set up the statute of limitations of two years, pre-

scribed by section 2 of the bankrupt act, and now embodied in the Revised Statutes as section 5057.

The case was submitted to the Circuit Court upon an agreed statement of facts, a jury having been waived. The court found for the defendant, holding, in an opinion which appears in the record, that the cause of action was barred by the limitation of two years pleaded. Judgment was, therefore, rendered for the defendant. The plaintiffs below having brought the case here by writ of error, insist that the judgment of the Circuit Court should be reversed, assigning as error the ruling of the court upon the statute of limitations and the rendition of the judgment for defendant.

J. E. McKeighan and *A. A. Ramsey*, for plaintiffs in error.

S. Bartlett, *W. G. Russell*, and *George Putnam*, for defendant in error.

WOODS, J.—The averments made in the declaration were substantially supported by the agreed facts, and there should have been judgment thereon for the plaintiffs in error unless, upon the facts as disclosed, they were shown not to be entitled to a recovery on the merits, or unless the statute of limitations was a bar to the action.

The defendant in error insists, first, that the third and fourth issues of stock, which were made after the limit had been reached, within which the amount of capital stock of the company was restricted by the laws of Kansas, were absolutely void, and no assessment could be made on them which he was bound to pay; secondly, that the sums voluntarily paid by him upon his void stock should be applied to the payment of the balance due on his valid stock, and that when so applied they would fully satisfy the assessment thereon; and thirdly, that in any event the facts sustained the plea of the statute of limitations. We shall consider these contentions in the order stated.

The Constitution of Kansas forbids special charters. (Art.

12, sec. 1.) All corporations in that State are, therefore, organized under general laws. The Fort Scott Coal and Mining Company was organized under the general law of the State, which, with its articles of incorporation, required by the law to be filed with the secretary of State, constituted its charter. By the articles of incorporation the original stock of the company was fixed at one hundred thousand dollars. Chapter 23, section 14, of the statutes of Kansas provides that "any incorporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital." The second issue increased the stock of the company to $200,000, which was the limit prescribed by its charter. The question, therefore, is whether the stock of the third and fourth issues, by which the aggregate amount was raised to $400,000, is or is not void.

As a general rule corporations can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties. (Fertilizer Company *v.* Hyde Park, 97 U. S., 650; Solomons *v.* Laing, 12 Beav., 339; Eastern Counties Railway *v.* Hawkes, 5 H. L. Cases, 348.)

And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void. (Mechanics' Bank *v.* N. Y. & N. H. Railroad, 13 N. Y., 599; New York and New Haven Railroad Co. *v.* Schuyler, 34 N. Y., 30; Railway Co. *v.* Allerton, 18 Wall., 233; Stace & Worth's Case, Law Rep., 4 Ch., 685, note.)

In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires.* The stock itself was therefore void. It conferred on the holders no rights and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders and the stock of the third and fourth by another, in a contest between them the latter would have been ex-

cluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holder of such spurious stock has none of the rights he cannot be subjected to the liabilities of a holder of genuine stock. His contract to pay for spurious shares is without consideration and cannot be enforced.

It is insisted, however, that the defendant in error having attended by proxy the meetings at which the increase of the stock of the company beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company by its agents having held itself out as possessing a capital of four hundred thousand dollars, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full.

We think the defendant in error is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. (Upton *v.* Tribilcock, 91 U. S., 45; Chubb *v.* Upton, 95 U. S., 665; Pullman *v.* Upton, 96 U. S., 328.) But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant.

But here, the corporation being absolutely without power to increase its stock above a certain limit, no acquiescence of the shareholder can give it validity, or bind him or the corporation. "A distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which or upon the terms upon which they have been issued.

The holders of shares which the company has no power to issue, in truth had nothing at all, and are not contributors." (2 Lindley on Partnership, 138; and see Lathrop *v.* Kneeland, 46 Barb., 432; Mackley's Case, L. R., 1 Ch., 247.)

In Stace & Worth's Case, L. R., 4 Ch., 682, note, it appeared that there was an agreement for the amalgamation of the London Northern Insurance Corporation and the Life Investment Mortgage Insurance Company, the two corporations to be formed into one, under the name of the corporation first mentioned. The corporation was to issue shares in exchange for those held in the company, and the amalgamated board was to consist of the five directors of the corporation and of seven of the directors of the company, to be selected by themselves. After the amalgamation Stace and Worth, it was alleged, received and accepted certificates for shares in the corporation in exchange for their shares in the company, and they with five others were appointed directors of the corporation. Afterwards a resolution was passed for voluntarily winding up the corporation, and the names of Stace and Worth were placed upon the list of contributors. An application was made to Vice-Chancellor James to have their names removed from the list, who, after hearing the case argued, directed their names to be removed. This was done on the ground that the agreement for amalgamation was beyond the powers of the corporation, and therefore void. In giving the reasons for his decision Vice-Chancellor James said: "It is, however, contended that notwithstanding the agreement itself was *ultra vires* and void, yet there are personal acts and things personally affecting these two gentlemen which render them still liable as shareholders." These were the acceptance of shares by Stace and Worth, the fact that their names appeared on the register of shareholders, and that they had set as directors of the corporation after the attempted amalgamation. But the vice-chancellor declared: "This was a void agreement, with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It

comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentlemen on the list of stockholders."

So in Zabriskie *v.* The Cleveland, &c., Railroad Co., 23 How., 381, this court, after holding the railroad company to be liable on certain bonds which it was alleged had been indorsed by the directors without lawful authority, added: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization."

Upon the principles stated in these authorities, we are of opinion that the defendant in error is not estopped by any acts of his to assert the invalidity of the stock issued in excess of the limit authorized by the charter, and to deny his liability thereon.

It would seem to follow that if he is not estopped by his own acts, he is not by the acts of the agents of the Fort Scott Coal and Mining Company, in representing the company, by advertisements and otherwise, as having a capital of $400,000.

The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. (Zabriskie *v.* The Cleveland, &c., Railroad Co., *ubi supra.*) The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false.

As forcibly suggested by counsel for defendant in error, if any creditor has been defrauded by misrepresentation of the real capital of the company, he has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors who

have not suffered from the alleged fraud to recover of the entire body of stockholders who have taken no part in it.

We are of opinion, therefore, that the defendant in error is not estopped, either by his own acts or the acts of the agents and officers of the company, to allege the nullity of the over-issue stock, and that he is not liable to an assessment on such void stock.

The next question for our consideration is whether the defendant in error is entitled to offset against his liability to pay the sum due on his valid stock the money paid on his void stock.

It is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability to assessment on his stock in the corporation in a suit by an assignee in bankruptcy. (Sawyer *v.* Hoag, 17 Wall., 610; Upton *v.* Sawyer, 91 U. S., 56; Scammon *v.* Kimball, 92 U. S., 362; County of Morgan *v.* Allen, 103 U. S., 498.)

The ground upon which this rule stands is thus stated by Mr. Justice Miller in Sawyer *v.* Hoag: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging in equity to all its creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

The defendant in error seeks to avoid the application of this rule to his case on the ground that the real capital of the company was only two hundred thousand dollars, and this constituted the trust fund for the security of the debts of the company; that all the money that had been paid in as capital stock had been paid into that fund, and that the party paying any money to that fund was entitled to credit upon his dues thereto.

We cannot assent to this view. The defendant in error was as much bound to know the limits of the charter of the company in which he was a stockholder as the public or creditors

of the company. He knew, therefore, that all stock issued beyond the limit fixed by the charter was absolutely void. When he paid in his money on the void stock he knew that he was not paying it on the valid stock, and he is presumed to have known that it was not a good payment on the valid stock. The company had no right to apply it on the valid stock without his direction. He never directed such application, and it remained in the possession of the company until the rights of the assignees in bankruptcy attached. To say that it was a contribution to the trust fund devoted to the payment of the creditors of the company is an entire misapprehension. It could not be such contribution unless it were a payment on the stock of the company, and this we have seen was not the case. No call had been made by the company for payment on the valid stock, to which the amounts paid on the void stock could be said to apply. No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors, and it does not appear that when the payments were made the company had any creditors. It was a voluntary payment for the benefit of the company, and tended to increase the value of the authorized stock. In that way the stockholder got the benefit of it. There is no rule of law or equity which entitles him, in a contest between himself and a creditor of the company, either to receive a credit for it on his unpaid stock, or to have it repaid to him *pro rata* out of the assets of the company. We are of opinion, therefore, that it could not be offset against the money due on the valid stock held by him.

We are next to consider whether, upon the facts as disclosed by the record, the defense of the statute of limitations should have been sustained. The precise question with which we have to deal is, When would this action at law, brought by the assignees of the bankrupt company against a stockholder to recover a part of the balance due on his stock, be barred by the statute?

This will depend on the answer to the question, When did

the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? (Wilcox *v.* Plummer's Ex'rs, 4 Pet., 172; Amy *v.* Dubuque, 98 U. S., 470.)

The stock held by the defendant in error was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter of the company or by any law or public policy, and as between the company and its stockholders was just as binding as if it had been expressly authorized by the charter.

If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied "by discount," according to their contract the stockholders could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid on a fair understanding, and that bound the company.

In fact, it has been held in recent English cases that not only is the company but its creditors also bound by such a contract. (Waterhouse *v.* Jamieson, L. R., 2 H. L., sec. 29; *ex parte* Currie, 3 De G., J. & S., 367; Carling's Case, 1 Ch. Div., 115.)

But the doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they could set aside; that when their rights intervene and to satisfy their claims the stockholders could be required to pay their stock in full. (Sawyer *v.* Hoag, assignee, 17 Wall., 610; New Albany *v.* Burke, 11 Wall., 96; Burke *v.* Smith, 16 Wall., 390.)

The reason is that the stock subscribed is considered in

equity as a trust fund for the payment of creditors. (Wood *v.* Dumner, 2 Mason, 308; Mumma *v.* Potomac Co., 8 Pet., 286; Ogilvie *v.* Knox Ins. Co., 22 How., 387; Sawyer *v.* Hoag, *ubi supra.*) It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will, at his instance, require it to be paid.

In this case the managers and agents of the bankrupt company had in effect represented to the public that all its capital stock had been subscribed for, and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the company and its stockholders was this, namely, that the stockholders should pay, say, for example, twenty dollars per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the company, and when the necessity arose and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required.

When the company was adjudicated a bankrupt, the assignees were bound by this contract, thus equitably construed. Their duty was to collect a sufficient sum upon the unpaid stock which, with the other assets of the company, would be sufficient to satisfy the company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock; for if, in a bankruptcy proceeding, any surplus remained after payment of debts, it would go to the company, and not to the stockholders. And we have seen the company in this case would have no right to any surplus.

The question for solution is, therefore, when, under the facts of this case, did the cause of action accrue against the defend-

ant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.

It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. (Curry *v.* Woodword, 53 Ala., 371; Robinson *v.* Bank of Darien, 18 Ga., 65; Ward *v.* Griswoldville Man. Co., 16 Conn., 601.) But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand. (Van Hook *v.* Whitlock, 3 Paige Chan., 409; Salesbury *v.* Black's Adm'r, 6 Har. & J., (Md.,) 293; Sinkler *v.* Indiana, &c., Turnpike Co., 3 Penn., 149; Walter *v.* Walter, 1 Whart., (Penn.,) 292; Quigg *v.* Killeridge, 18 N. H., 137; Nimmo *v.* Walker, 14 La. Ann., 581.)

In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant in error owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder, to the effect that

the latter should not be required to make any further payments on his stock, should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was in effect a proceeding to accomplish two purposes: first, to set aside the contract between the company and the stockholder; and second, to fix the amount which the stockholder should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

It appears from the petition of the assignees, plaintiffs in error, for an assessment upon the stock of the bankrupt company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the court for an order directing that the stockholders should pay a part of the amount due on their shares of stock and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the court and the stockholders required to pay it, the action was brought long before the limitation of the statute could bar it.

All the delay which has occurred has been caused by the proceedings of the assignees, taken for the benefit of the stockholders, in order that they might not be subjected to unnecessary and onerous exactions. The lapse of time between the filing of the petition for the assessment and the decree of the bankruptcy court thereon is chargeable to continuances made by order of the court and to the opposition of the stockholder referred to. It does not lie in the mouth of defendant in error to say that while the steps necessary to fix his liability and

limit its amount were being taken, the bar of the statute has intervened and cut off his liability altogether.

The cases cited by the defendant in error to sustain his contention that the cause of action accrued to the assignees in bankruptcy at the time of their appointment, are clearly distinguishable from this. In Terry *v.* Tubman, 92 U. S., 156, the suit was by a billholder of an insolvent bank against a stockholder to enforce the individual liability of the latter to pay the bills of the bank held by the former. The court decided that the case was not so much like that of the guarantee of the collection of a debt where a previous proceeding against the principal is implied, as it was like a guarantee of payment where resort may be had at once to the guarantor, without a previous proceeding against the principal. The conclusion of the court, therefore, was that the cause of action in favor of the billholder arose against the stockholder when the bank ceased to redeem its notes and became notoriously and continuously insolvent. It is clear that this authority has no application to the question in hand.

The case of Terry *v.* Anderson, 95 U. S., 628, also relied on by defendant in error, was a suit in equity to enforce the individual liability of the stockholders of a bank, and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the court held that the statute of limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

In the cases of Baker *v.* Atlas Bank, 9 Met., 182, and Commonwealth *v.* Cochituate Bank, 3 Allen, 42, also relied on by defendant in error, it appeared that upon suspension of payment by the banks there was a present and unconditional liability of their stockholders, which the court held was barred by the limitation of six years. In the case of Baker *v.* Atlas Bank the court said: "The demand sought to be enforced in

this suit was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock an action accrued to the bank, according to the construction of the thirtieth section (Rev. Stats., c. 36) which is contended for by plaintiffs counsel, to recover the sum from the stockholders respectively, equal to each one's share of stock. The statute therefor began to run in strictness immediately on the loss of the capital stock, and certainly when the bank stopped payment, and after the lapse of six years from that time the debt was barred."

But in the present case, as we have seen, as between the company and its stockholders there was no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until, at the very least, the necessity for the payment had been ascertained and an authorized demand of payment made.

It is said by defendant in error that to hold that the suit to recover the sums due on the stock held by him is not barred, would defeat the policy of the bankrupt act, which is a speedy settlement of the bankrupt's estate and the equitable distribution of his assets among the creditors.

Unquestionably a prompt administration of the bankrupt's assets was one of the ends which the bankrupt act had in view; but this policy must be held to be subordinate to a just regard for the rights of both the creditors and debtors of the bankrupt estate. The debtor cannot be forced to pay before his contract requires it, merely because the assignee may be in haste to close up the estate. If his obligation were evidenced by a promissory note due at a future day, he could not be compelled to pay it before maturity in order that the bankrupt estate might be speedily settled. So if some act must be done by the assignee, such as a demand of payment before his liability is fixed, he cannot be compelled to pay until the prerequisites have been performed. In short, until an unconditional

liability to pay something is fastened on the debtor, no action can be maintained against him, and the statute of limitations does not begin to run in his favor. The suggestion that the assignee may postpone indefinitely the necessary steps to fix the liability of the debtor, and thus defeat the policy of the law, does not answer the proposition that the debtor cannot be sued until a cause of action has accrued against him. It is presumed that the assignee will do his duty. If he fails to do it he is subject to the order of the bankruptcy court, which, at the instance of those interested, can compel him to act.

Our opinion is, therefore, that this action at law, prosecuted by the plaintiffs in error, assignees in bankruptcy of the Fort Scott Coal and Mining Company, against the defendant in error, to recover from him the balance due on his unpaid valid stock in said company, was not barred by the limitation of two years prescribed by the bankrupt act.

For the error in holding that the action was barred, the judgment of the Circuit Court must be reversed and the cause remanded with directions to award a new trial.

REVERSED.

MR. JUSTICE FIELD and MR. JUSTICE GRAY dissented.

THE CONTINENTAL BANK NOTE COMPANY OF THE CITY OF NEW YORK *v.* THE UNITED STATES.

March 20, 1882.

The Continental Bank Note Company *held* not entitled, under its contract, to recover compensation from the United States for the stamps manufactured by it and not called for by the United States.

APPEAL from the Court of Claims.

John R. Dos Passos and *William McMichael*, for appellant.

S. F. Phillips, Solicitor-General, for appellee.

Opinion of the court.

WAITE, C. J.—The appellant, by its several contracts sued on, was bound to furnish the Post-Office Department all the adhesive postage stamps that might be required during a period ending on the 30th day of April, 1877. As part of the several contracts, also, it bound itself to keep on hand at all times a stock of the several denominations of stamps sufficient to meet all the orders of the department, and to provide against any and all contingencies likely to occur, so that each and every order might be promptly filled. For this the United States agreed to pay, at the stipulated prices, for all stamps delivered, and, by express stipulation, this was to be "full compensation for everything required to be done or furnished under" the contracts. Deliveries were to be made at the post-office in New York or the department in Washington. From this it is apparent there was no liability on the part of the United States to pay until (1) there had been a requisition by the department, and (2) a delivery in conformity with what was required. The contracts were limited to a fixed period. The United States were neither bound to order nor the appellant to deliver after the end of the term. Although the stock on hand was manufactured and stored under the supervision of an agent of the department, it remained the property of the appellant until delivered under the contracts. The inspection and supervision of the agent during the manufacture and storage were to guard against losses and frauds and to insure promptness in delivery. The ownership was not changed until the delivery which the contracts provided for was complete. If loss occurred by reason of the failure of the United States to call for the whole stock on hand before the end of the term, it was compensated for in the payment for what was delivered. Such was the express agreement of the parties.

The judgment is affirmed.

AFFIRMED.

Statement of the case.

CHARLES E. LEWIS v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR.

March 13, 1882.

The act of Kansas of March 2, 1872, requires that bonds issued by counties to aid various public improvements, if subscribed conditionally, shall be deposited with the State treasurer in escrow till the performance of the condition. It also provides that the holder of such bonds shall present them to the State auditor for registration, who, on being satisfied that such bonds have been issued according to the provisions of the act, and that they are genuine, shall register them, and certify on them that they have been regularly issued and are genuine. Certain bonds, unconditional on their face, issued by a county in Kansas, were fraudulently put into circulation without passing through the hands of the treasurer, and the certificate of the auditor fraudulently obtained: *Held*—

1. That the act did not require as a necessary prerequisite to their negotiability that they should in all cases pass through the hands of the treasurer before reaching the auditor.

2. That the action and certificate of the auditor is conclusive evidence, as between the county and a *bona-fide* holder, that the bonds, unconditional on their face, were regularly and legally issued, and therefore negotiable.

ERROR to the Circuit Court of the United States for the District of Kansas.

At an election duly called and held on the 27th day of August, 1873, in the county of Barbour, State of Kansas, the qualified voters of that county gave their sanction to a donation of one hundred thousand dollars in bonds of the county to aid in the construction of the Nebraska, Kansas and Southwestern Railroad. By the terms of the proposition voted on the bonds were to be placed in the hands of the State treasurer in escrow, one-half deliverable when the proposed road was constructed to Medicine Lodge, and the remainder when completed through the county. A few days after the election the bonds were signed, sealed, and duly attested by the proper officers of the county, in conformity with the order of its board of commissioners. They are dated September 1, 1873, and payable to the railroad company, or bearer, with interest, semi-annually,

at the rate of ten per cent. per annum, both the principal and interest payable at the National Park Bank in the city of New York. Each one is signed by the chairman of the board of county commissioners, is attested by the county clerk, and purports upon its face to be "one of a series of one hundred bonds of one thousand dollars each, all of like tenor and date, * * * issued for the purpose of aiding in the construction of the Nebraska, Kansas and Southwestern Railroad through said Barbour county, in the State of Kansas, under and in pursuance of an act of the Legislature of the State of Kansas entitled 'An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872."

There is nothing upon the face of the bonds indicating that the donation was otherwise than absolute and unconditional.

They were left by the county officers with one Hutchinson, to be deposited with the treasurer of State, as required by the terms of the proposition upon which the people voted. They were, however, never so deposited, but by Hutchinson were procured to be registered by the auditor of State, and then fraudulently put in circulation.

An indorsement was made upon each bond by the State auditor as follows:

"STATE OF KANSAS, *ss.*

I, D. W. Wilder, auditor of the State of Kansas; do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

"In witness whereof I have hereunto set my hand and affixed my seal of office, at Topeka, this 19th day of November, 1873.

"D. W. WILDER, *Auditor.*"

The plaintiff in error, who was plaintiff below, became the

holder of the bonds and coupons by purchase before the maturity of any of the coupons, and (according to our interpretation of the facts specifically found) without notice of any fraud in their execution or issue, unless, as claimed by the defendant in error, such notice was furnished by the terms of the act under which they purport to have been issued.

The present action was brought to recover the coupons due September 1, 1875, March 1, 1876, and September 1, 1876. The defense is placed upon the ground that the bonds were issued in plain violation of the act of 1872, and that all persons, whether purchasers in good faith or not, were required to take notice of the fact that they were not binding obligations of the county. Before adverting to the specific grounds upon which their validity, as against the county, is questioned,—which grounds were sustained by the court below,—it is necessary to examine with some particularity the provisions of the act of 1872, and ascertain its general scope and purpose. (Laws of Kansas 1872, p. 110.)

The first section provides that the board of county commissioners of any county, the mayor and common council of any incorporated city, and the trustee, clerk, and treasurer of any municipal township in the State may issue the bonds of such county, city, or township, in any sum necessary, not greater than ten per cent., inclusive of all other bonded indebtedness, of the taxable property of such county, city, or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water-power, by donation thereto, or the taking of stock therein, or for other works of internal improvement. But it is declared in the same section that all counties may, in addition to the amount therein authorized, issue bonds not exceeding one hundred thousand dollars.

The second section provides that the bonds so issued should be payable at such place in the city of New York as the officers issuing the same might direct, in not less than five nor more than thirty years from the date thereof, with interest not to exceed ten per centum per annum, "all in the discretion

of the officers issuing the same," the interest to be payable semi-annually, and evidenced by coupons attached—such bonds, if issued by a county, to be signed by the chairman of the board of county commissioners and attested by the county clerk.

The third section declares that before any bonds are issued the same shall be ordered by a vote of the qualified electors of the municipality.

The eighth section provides, among other things, that if the proposition voted for be to aid in the construction of a railroad, (either by donation thereto or the taking of stock therein,) or other work of internal improvement, that the proper officers of the municipality shall at once subscribe upon the books of the railroad company, "specifically setting forth the conditions upon which such subscription is made, the amount of such donation thereto, stock taken therein, or bonds voted therefor."

The eleventh section, upon the construction of which the case turned in the court below, is in these words:

"That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge or other work of internal improvement, either by donation thereto or the taking of stock therein, then upon the subscription being made, as hereinbefore provided, the officers of such county, city, or township [shall thereupon issue the bonds of such county, city, or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original or a copy of the subscription, setting forth its terms in full, to the treasurer of State, which said bonds shall be held by the said treasurer of State in escrow until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of said subscription being in all things fully complied with, then the treasurer of State shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: *Provided*, That such bonds shall not bear interest or be negotiable until after the de-

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livery and registration thereof: *And provided further*, That in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the treasurer of State cancelled and redelivered to the county, city, or township issuing the bonds: *And provided further*, That this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same."

The twelfth section makes it the duty of the municipality issuing the bonds to register the same in a book kept for that purpose, showing the date, amount, maturity, and rate of interest, and if to aid in the construction of a railroad or other work of internal improvement, of what railroad or other work of internal improvement, and whether the same be a donation or for stock therein; and at the same time transmit to the auditor of State a certified statement, attested by the clerk, under the corporate seal of the municipality, of the number, amount, character of the bonds, to whom, and for what purpose issued.

The thirteenth section declares it to be the duty of the clerk of each county, city, or township in the State, within sixty days after the act took effect, and thereafter on the first day of January and July of each year, and at such other times as the auditor may request, to transmit to that officer a certified, full, and complete statement of the bonded indebtedness of every description of said municipality, particularly setting forth the nature of such bonds and for what they were issued. From such statement the auditor is required to make a faithful record of the bonded indebtedness of the several counties, cities, and townships of the State, noting therein all bonds subsequently issued, paid, or cancelled, as the same may be reported to him.

The fourteenth section has an important bearing upon the case, and is in these words:

"Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the auditor of State for registration, and the auditor shall, upon being satisfied

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that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof."

The remaining sections, among some things of an unimportant character, provide that the auditor shall annually ascertain the amount accrued and to accrue before the tax of the succeeding year shall be levied and collected (for the final redemption of the same) upon all bonds registered in his office, and certify the amount thereof to the clerk of the county in which the bonds are issued; that the clerk of the county shall thereupon proceed to ascertain the amount of tax necessary to pay the interest and create a sinking fund in compliance with the auditor's certificate; that the county treasurer shall, at the time of his annual settlements with the State treasurer, pay over to the latter moneys collected under the act, take duplicate receipts therefor, one copy of which shall be filed with the auditor of State; that the State treasurer out of the moneys so received shall pay off the interest accrued upon such registered bonds, taking up the interest coupons, which shall be canceled and filed with the auditor of State; that the moneys thus collected and remaining in the hands of the State treasurer, after the payment of the interest accrued, except that accruing for the current year, shall be retained as a sinking fund for the final redemption of the bonds; that when any registered bonds mature, the same shall be paid by the State treasurer out of any money in his hands for that purpose, and, when paid, canceled and filed with the auditor, who

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shall enter satisfaction in the record of registration; that the treasurer and auditor of State shall annually publish a detailed statement of the business transacted by them under the act during the preceding year; and that the State shall be deemed the custodian only of the taxes so collected and credited to such municipality, in no manner liable on account of such bond, but the tax and funds so collected to be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds until fully satisfied, the State treasurer to be liable on his official bond for the faithful disbursement of all moneys so collected or received by him.

This summary of the provisions of the act is sufficient to show the relations which the officers of the State, particularly the State auditor, held to such municipalities as undertook to aid in the construction of railroads by donation or by subscription of stock.

James Grant, for plaintiff in error.

Edward Stellings, *Thomas B. Fenlon*, and *A. M. F. Randolph*, for defendant in error.

HARLAN, J.—We have carefully considered the reasons upon which the judge of the Circuit Court based the conclusion that the county was not liable upon the bonds even in the hands of a *bona-fide* purchaser for value. Its opinion seems to proceed upon these grounds: That the act of 1872 imposed as a condition precedent, as well to the bonds bearing interest as to their negotiability, that they should pass through the hands of the State treasurer, he alone being invested with authority to determine when they should be delivered to the parties entitled thereto for the purposes of registration; that the requirement of such condition was manifest from the statute, of the terms of which all were bound to take notice; that although the bond on its face disclosed no conditions whatever for their delivery, the purchaser should have ascertained whether, prior to registration, they had, in the first instance,

been deposited with the State treasurer in escrow, and that he could not take the certificate of the auditor as conclusive evidence that the statute had been pursued; that as the bonds were not placed in the hands of the treasurer, they never had the quality of negotiability, and could not, therefore, have been rightfully registered, nor their regularity and legality certified by the auditor under his seal of office; and since the conditions affixed by the popular vote had never been performed by the construction of the proposed road, the bonds did not constitute valid obligations of the county.

We are unable to concur in some of the views expressed by the learned judge, and not at all in the conclusion that the bonds were not enforcible against the county. The fundamental proposition upon which that conclusion seems to rest, is that a bond executed under the act of 1872 could not, consistently with the purpose and language of the statute, be registered and issued, even when the subscription was payable immediately and without conditions, unless, in the first instance, it be delivered to the treasurer of State, and is by him delivered to the parties entitled thereto. This interpretation of the statute is not, we think, justified by any fair construction of its provisions. Under some circumstances, distinctly disclosed upon the face of the act, it is not at all necessary that the bonds be delivered to the treasurer in order that they may be registered and become the valid obligations of the municipality in whose name they are issued. The last proviso of the eleventh section expressly declares that that *section*—the only one which refers to the custody of the bonds by the State treasurer—"shall *not apply* when the people have named some party as trustee in their vote upon the proposition, and the contractor [that is, as we suppose, the railroad company proposing to do the work of construction] may thereafter agree to the same." If the people on one side and the railroad company on the other agree upon a trustee to hold the bonds until certain contingencies happen, or until certain terms or conditions are performed, in such case the statute explicitly declares the eleventh

section shall not apply. Again, suppose the people had voted —as, it would seem, that under sections one, two, and three they might have done—for a donation, or in favor of a subscription of stock, to be paid in bonds, deliverable at once, without any conditions or terms whatever: could it be claimed that bonds of that kind must, of necessity, have been delivered to the treasurer of State? If so, for what purpose could he have received them? What ends could have been subserved by his custody of them, when to their delivery no conditions were attached? When should he, in such case, have delivered them to the parties entitled thereto? If, in the case supposed, the railroad company, under the agreement with the county, and under the vote of the people, became entitled, at once, to the bonds for the purpose of having them registered, and the required certificate of the auditor indorsed thereon, it cannot be that the Legislature intended the parties to perform the idle ceremony of passing them through the hands of the treasurer, to be by him immediately surrendered to the proper parties. That officer, in the case put, has no duty to perform, such as the act imposes when conditions are attached to a subscription. For these reasons we are of the opinion that the eleventh section, in so far as it requires a delivery of bonds to the State treasurer, has no application except in cases where, to the subscription, whether of donation or of stock, are annexed conditions to be complied with before that officer may rightfully surrender the bonds intrusted to him. The object of that section is to prescribe a mode in which the people of a county may, if they pursue the statute, be protected, in some degree, against a premature delivery of county bonds by local officers in advance of the performance of conditions imposed by popular vote.

If we are correct in this interpretation of the statute, it follows that the purchaser of these bonds was not informed by the statute that they belonged to that class which were imperatively required to be deposited, in the first instance, with the

State treasurer, and by him held until the conditions upon which they were to be delivered were fully performed.

But it remains for us to consider the important practical question as to the rights of the parties, in view of the admitted fact in this case that the proposition approved by popular vote did, in terms, provide for the ultimate delivery of the bonds only upon certain conditions—bonds, therefore, which ought to have been, but were not, delivered by the county officers to the State treasurer, to be held until the prescribed conditions were performed. The determination of this question, so far as it involves the good faith and diligence of the parties, is somewhat complicated by the absence of any finding as to whether the subscription was, in fact, made on the books of the company, "specifically setting forth the conditions" upon which it was made; (sec. 9;) or whether the original or a copy of the subscription was, in fact, delivered or even transmitted to the treasurer of State; (sec. 11;) or whether the officers of the county themselves made a record of the bonds in a book kept for that purpose; (sec. 12;) or whether they transmitted to the State auditor a certified statement, attested by the county clerk, "of the number, amount, and character of the bonds so issued, to whom issued, and for what purpose." (Sec. 12.) We cannot, therefore, certainly know what facts would have been ascertained by the purchaser had he resorted to all those sources of information—an investigation upon which, for reasons hereafter to be stated, he was not required to enter. We have in the special finding only the fact that the county, under the order of the board of commissioners, executed bonds payable to the railroad company *or bearer*, and purporting to have been issued under and *in pursuance of* the act of 1872; and that the bonds were left by the county officers with Hutchinson for delivery to the State treasurer, when the statute required the county authorities themselves to deliver the bonds to that officer.

Now, it is to be observed that the bonds do not upon their face indicate that they were deliverable upon the performance

of certain conditions. They are made payable, unconditionally, to bearer, at a designated place and at a specified time. By the act of the county officers intrusting the bonds to one upon whom no official responsibility rested, that individual was enabled to represent himself to the auditor as presumptively the owner, because the bearer, of the bonds. But these facts, it is insisted, are of no consequence in view of the statutory provision declaring, in effect, that bonds of the kind here in suit "shall not bear interest or be negotiable" until after their delivery by the State treasurer to the parties entitled thereto. Whatever force might be conceded to this argument, looking alone to the requirements of the 11th section of the act, we are of opinion that more consequence is to be attached to the action of the auditor of State, under the 14th section, than seems to have been done by the court below. The presumption is that the Legislature, while aiming to guard local communities against the fraudulent conduct of their officers, intended also to afford, in some degree, protection to those becoming, in good faith, purchasers of municipal securities which those officers were authorized to execute, and which they might put into circulation or negligently permit to get into circulation. Hence, as we think, the requirement as to the registration of bonds issued under the act, and the duty of the State auditor, upon registration, to attest their regularity and legality by a certificate under his seal of office.

The State treasurer may improperly surrender bonds deposited with him for delivery only upon the performance of specified conditions. But such delivery would not constitute them binding obligations upon the municipality in whose name they are executed. The holder is under a necessity by the statute to do something more. He is required to present them for registration to another officer, the auditor of the State, in whose office was (if the county authorities obeyed the statute) kept a record of the number, amount, and character of the bonds, to whom issued, and for what purpose. And

that officer is not under a duty to admit the bonds to registration simply because asked to do so, and without making inquiry as to their regularity and legality. Unless satisfied that they are issued in accordance with the provisions of the act, he is bound to deny the application for registration. But if satisfied that the provisions of the statute have been pursued, he is required to register bonds and certify upon each one, under his seal of office, that it has been regularly and legally issued. To him, therefore, is committed, by the State, the important function of finally determining whether the law has been, in all respects, obeyed, and, consequently, whether the bonds have been regularly and legally issued. His determination necessarily involves an investigation as to every fact essential to their validity. Purchasers in good faith, although required to know what the statute contained, are not bound, under such circumstances as are here disclosed, to go behind the auditor's certificate, and find out whether that officer has ascertained all the facts, or whether he has correctly and honestly passed upon the questions arising upon an application for registration. The investigation which the statute authorized the auditor to make involved the inquiry whether the bonds were of the class which should have passed through the hands of the treasurer, and also whether the conditions upon which they were deliverable had been performed. Purchasers have the right to assume—having no notice to the contrary—that he has, in these respects, discharged his duty. The registration acts, in some of the States, while imposing like duties upon State auditors, and requiring them (when the facts justified them in so doing) to certify upon municipal bonds that they have been issued in compliance with law, expressly declare such certificates to be *prima-facie* evidence only of the facts stated, and shall not prevent proof to the contrary in any suit involving the validity of the bonds, or the power and authority of the municipality in whose name they are executed to issue them. (101 U. S., 694.) But the statute in question contains no such provision. The Legislature of Kansas con

fers upon the auditor of State full authority to ascertain and determine whether bonds presented for registration have been issued in accordance with the statute, and if satisfied such is the fact, it is made his duty to certify upon the bonds that they have been regularly and legally issued. Had it appeared upon the face of these bonds that they were deliverable upon certain terms, and therefore belonged to the class which should pass through the hands of the State treasurer, and if the purchaser, in such a case, be held to have taken the bonds subject to the statutory requirement that they were not negotiable unless they had been, in the first instance, actually delivered by or in behalf of the county officers to the State treasurer, and by the latter surrendered to the proper parties, it is clear no such condition can be attached to the purchase by appellant. For the bonds here in suit do not disclose the conditional nature of the subscription, nor that they belonged to the class which, as a condition precedent to their negotiability, must have been delivered to the State treasurer. That these facts were not disclosed upon the face of the bonds is the fault of the county, and it is estopped, as against a *bona-fide* purchaser, to deny that they were of the class which might have been delivered at once, and without going through the hands of the State treasurer, to the auditor of State, and been by him registered and certified as regular and legally issued. In such a case, at least, the action and certificate of the auditor of State must be deemed conclusive evidence, as between the county and a *bona-fide* purchaser, that the bonds were regularly and legally issued, and therefore negotiable, in the fullest sense of that word. If such be not the construction of the registration act, it is difficult to perceive of what practical value is such certificate, or what the Legislature intended by the requirement that the auditor should, after examination into the facts, attest the regularity and legality of the bonds. If the determination of that officer, in this case, operates hardly upon the people of the county, the result must be attributed to the legislation in question as well as to the negli-

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gence of the State and county officers. What we have said is in harmony with the settled doctrines of this court upon the subject of negotiable securities issued by municipal corporations, as announced in numerous cases with which the profession is familiar, and which need not be here cited.

There are other questions in the case; but they are of minor importance, and it seems to be unnecessary to consider them.

Judgment reversed and cause remanded with directions to enter a judgment in favor of the plaintiff below.

REVERSED.

THE UNITED STATES v. WILLIAM G. TEMPLE.

March 13, 1882.

Officers of the navy, while traveling under orders, engaged in public business, are, under the act of June 30, 1876, entitled to mileage for the distance traveled both by land and sea, and the alleged practice of the accounting officer of the Treasury to allow only actual expenses for travel by sea and mileage only for travel by land, is wholly without warrant.

APPEAL from the Court of Claims.

This was an action brought in the Court of Claims by the defendant in error, a commodore in the United States navy, to recover mileage for travel under orders.

The controversy arises upon the construction of an act of Congress. The history of the legislation of Congress on the subject of mileage to officers of the navy is as follows: On March 3, 1835, an act was passed which, after giving certain pay, &c., to officers of the navy, declared that they should be entitled to no other compensation, but with an exception thus stated: "Except for traveling expenses while under orders, for which ten cents per mile shall be allowed." (4 Stats., 757, sec. 2.)

Afterwards this provision of the law of 1835 was abrogated by a clause in the act of June 16, 1874, (18 Stats., 72,) which

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was as follows: "That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal."

On June 30, 1876, however, mileage was restored to officers of the navy by the act of that date, (19 Stats., 65,) which declared: "And so much of the act of June 16, 1874, [&c.,] as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, while engaged in public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers so engaged in lieu of their actual expenses."

This act was in force when the travel for which defendant in error claims mileage was performed.

It appeared by the findings of the Court of Claims that the defendant in error traveled under orders, and while engaged in public business, from Washington city, via New York city and Rio de Janeiro, to Montevideo, in South America, and thence back to Washington city, via Rio de Janeiro, Liverpool, and New York. The voyages were performed in vessels not the property of the United States. The whole distance traveled was 16,660 miles. The defendant in error applied to the accounting officer of the Treasury for payment of mileage at the rate of eight cents per mile for the whole distance traveled by him. His demand was refused. But he was allowed eight cents per mile for the distance between the city of Washington and New York, going and returning. For all travel by sea the accounting officer would allow him only his actual expenses.

Upon suit brought the Court of Claims allowed the defendant in error mileage at the rate of eight cents per mile for the entire distance traveled by him, and rendered judgment therefor, after deducting the money actually paid him. The United States have appealed from this judgment.

S. F. Phillips, Solicitor-General, for appellants.

James Lowndes and *Enoch Totten,* for appellee.

WOODS, J.—The statute and the finding of the Court of Claims leave little room for controversy. The law as it stood when the travel was performed was explicit, and is not open to construction. We find in it no warrant for the distinction made by the accounting officer of the Treasury between travel by sea and travel on land within the United States performed by an officer of the navy while engaged on public business. To hold that for one class of travel he should have eight cents per mile and for the other his actual expenses, is to make the law and not to construe it. When this travel was performed there was not a line on the statute-book of the United States which made any provision whatever, under any circumstances, for allowing officers of the navy, when engaged on the public business, their actual expenses of travel. The only law ever enacted which made such provision had been expressly repealed by the act on which the defendant in error based his claim for mileage. This act declared him entitled, without condition or limitation, to mileage at the rate of eight cents per mile, and is the only law upon the subject.

Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. (Waller *v.* Harris, 20 Wend., 561; Potts *v.* Arthur, decided at the present term.) When the language is plain we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision.

The attempt to justify the decision of the accounting officer of the Treasury is based on an alleged practice in conformity therewith, which, it is said, grew up in the Navy Department under the act of 1835. There is no warrant for any such practice, if such there was, in the language of the act of 1835 any more than in the act of 1876. But even if such a practice could have any influence in settling the meaning of an act

passed forty-one years afterwards, under changed circumstances and conditions, it is sufficient to say that we find no reference to such practice in either the findings or opinion of the Court of Claims, and we cannot assume that it ever existed.

The law on which the defendant in error bases his case is plain and unambiguous. We must give it its natural and obvious meaning, and thus interpreted it leaves the plaintiffs in error no ground to stand on.

The judgment of the Court of Claims must be affirmed.

AFFIRMED.

THE GOULDS MANUFACTURING COMPANY v. JOHN P. COWING, GEORGE COWING, AND PHIL. COWING.

March 13, 1882.

In a patent case where an infringement was proved, it appearing that there was only a limited market for the invention infringed, (which was a pump for drawing gas from oil wells and conducting it to the furnace of the engine,) and that every article sold by the parties infringing drove out and took the place of one which otherwise would have been sold by the patentees, the true rule of damages is the difference between the price at which the article infringing the patent was sold and the actual cost of making it, multiplied by the number sold.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

William F. Cogswell, for appellant.

Elisha Foote, for appellees.

WAITE, C. J.—The only questions raised on this appeal relate to the amount the appellant is entitled to recover for the infringement of a patent for an improvement in pumps "specially designed for drawing off the gas from oil wells and conducting the same to the furnace of the engine." The validity of the patent and the infringement are not disputed here.

After the patent and infringement were established below, the case was sent to a master to ascertain the damages.

The master reported that two hundred and ninety-eight pumps had been manufactured and sold by the defendants, the appellees, out of which a net profit of $47.71 on each pump had been realized, that being the difference between the cost of the material and labor used in making a pump and the price at which it was sold. Upon this report the court ruled that as the patent was only for an improvement on an old pump, the profits for which the defendants were accountable must be confined to such as were realized from the manufacture of the patented improvement, and not from the whole pump as improved. For this reason a new reference was ordered to state the account on the proper basis.

The second report was in its results substantially the same as the first. The number of pumps made and sold was the same, and the profit on each pump estimated to be $46.46. The mode of calculating the profits was also the same; that is to say, on the second reference, as on the first, the defendants were charged with the price at which they sold the pump as a whole, and credited only with the cost of labor and material used in the manufacture. The master, on the second reference, however, reported further, as follows:

"I find as further facts from the evidence that the plaintiffs' pump, with their patented improvement, which they had introduced into the market, virtually controlled the market, and had superseded all the other pumps then in use for pumping gas, and the others were literally driven out of the market, as they could not be sold at the places where the plaintiffs' pump had been introduced. The defendants went into the very market where the plaintiffs' pumps had been introduced, and where they had sold and where plaintiffs were then supplying most of their pumps, and the defendants in fact went and employed Wenson, the former agent of the plaintiffs, to sell the pumps for them, and he, from being the plaintiffs' agent in the locality, made very ready sale of the same pumps for the de-

fendants, and had not the defendants interfered in urging the pumps which they manufactured upon this local market the plaintiffs would certainly have had the whole market to themselves, and would beyond doubt have secured orders and supplied the demand of the market for the same number of pumps more than they did sell, as the defendant furnished, to wit, two hundred and ninety-eight pumps. The plaintiffs were, by their agents in the field, furnishing pumps in those oil regions, and would have supplied the market demand had not the defendants intervened and supplied to the market these two hundred and ninety-eight pumps."

This finding as to the facts is in its general effect supported by the evidence. Notwithstanding this, however, the court, still adhering to its holding as to the rule of estimating profits, set aside the report; and inasmuch as the appellant had on the second reference failed to show what had been realized upon the principles of accounting prescribed, a final decree was entered in its favor for nominal damages only and costs. From that decree this appeal was taken by the complainant below.

The rule applicable to this class of cases was well stated by Mr. Justice Strong, speaking for the whole court, in Mowry *v.* Whitney, 14 Wall., 620. The subject-matter of that suit was a patent for an improvement in the process of manufacturing car-wheels, and in respect to the profits resulting to an infringer from the use of the patented process, it was said, page 651: "The question to be determined * * * is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits." It does not necessarily follow from this that where the patent is for one of the constituent parts and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made, which will be valuable

in the market and salable, then, as was further said in Mowry *v.* Whitney, page 651, the inquiry is, "what was the advantage in cost, in skill required, in convenience of operation or marketability," gained by the use of the patented improvement. If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such, we think, is this case. Pumps for all ordinary and many extraordinary uses were very old, but in the new developments of business something was wanted to take the gas from the casing of an oil well and conduct it safely to the furnace of the engine. "With that special purpose in view," this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to the value of the old pump, but for the new and special purposes in view the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use, except in the oil-producing regions of Pennsylvania and Canada. The demand was limited as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellant kept the control of its monopoly under the patent, it alone had the advantage of this market. Unless the appellees got the improved pump, they could not become competitors in that field, and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales

would have been effected. The fruits of the advantage they gained by their infringement were, therefore, necessarily the profits they made on the entire sale.

This is an exceptional case. A limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellant had, could easily and with reasonable promptness fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what has been the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits derived from their business in that special and limited market. This, as it seems to us, is the logical result of the rule which has been stated. By infringing on the appellant's rights the appellees obtained the advantage of the increased marketability of their pumps. The action of the court below, therefore, limiting the field of inquiry as to damages, cannot be sustained.

We cannot agree with the master, however, in his estimate of the profits made by the appellees from what they have done. He finds that the pumps sold in the market for eighty dollars each, while the cost of manufacturing them was only $33.54. It is true there is some evidence to show that pumps could be made for the sum named, but it is clear to our minds that many things were excluded from the estimate which ought to have been included. All the material and labor of men may have been taken into account, but there is nothing for the use of tools, machinery, power, and other facilities employed in the manufacture, and nothing for wastage and expenses of marketing. One of the appellees is reported as testifying that his firm made the pumps for $31.37 each, but this must be an error, because he at the same time stated he could not say that there was any profit at all at the prices for

which sales were made. Clearly this could not be, if what only cost the sum named was sold for $80. Annexed to the statement of the testimony of this witness is a detailed estimate of the cost of manufacture, which, without any allowance for general expenses, made the cost of a single pump $61.69. The appellant furnishes some evidence to contradict this estimate, but the bare fact that the pump when finished brought, as is claimed, at the shop eighty dollars, shows that the cost must have been much more than the master has reported. Down to the time of this patent the market had been supplied with some device to accomplish what this improvement did. The change in the old pump was not an expensive one. The valves were put outside of the side chambers instead of inside, and the joints had to be carefully fitted. If the old pump only cost as much as is claimed for the new, we cannot believe it would have commanded in the market any such price as the new sold for. We must conclude, therefore, that the cost of production has been much underestimated by the master. The testimony as reported is very unsatisfactory, and we are strongly inclined to think all has not been sent here which was presented. The attention of the parties was evidently directed much more to the rule of estimating the profits than to the detail of the expense of manufacture and sale. Had there not already been two references we should be inclined to order another. As it is, we have made the best estimate we can from the material furnished in the record, and conclude that a reasonable allowance for profits will be fifteen dollars on each pump, or $4,470 in all.

The decree is reversed and the cause remanded with instructions to sustain the fifth exception to the report of the master and enter a decree against the appellees for $4,470 and costs.

REVERSED.

D. M. RUSSELL, W. H. STOVALL, H. P. REID, ET AL. *v.* J. W. STANSELL, SURVIVING PARTNER OF PARTEE & STANSELL.

March 13, 1882.

In a case where various land-owners are assessed by court commissioners, each for small sums, on their lands, although the aggregate of such assessments may exceed $5,000, yet, inasmuch as they are liable each only for his own assessment, the matter in dispute, as regards their right to appeal, is the separate amount assessed against each, and not the aggregate of such amounts.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

On motion to dismiss.

H. T. Ellett, for appellee.

No brief filed for appellants.

WAITE, C. J.—Stansell, the appellee, obtained a decree in the Circuit Court of the United States for the Northern District of Mississippi in June, 1879, against the levee board of Mississippi, district No. 1, for $71,623.67. This decree being unsatisfied, Stansell instituted summary proceedings in the same court, under the provisions of the statute creating the levee board, to obtain an assessment and collection of the charge which was imposed on the lands in the district for its payment. On the 7th of February, 1880, the court entered an order which resulted in an assessment by commissioners appointed for that purpose. In this order it was provided that any person conceiving himself aggrieved by the action of the commissioners might, by petition to the court, present his grievance and obtain such redress as he should fairly be entitled to. On the 1st of February, 1881, D. M. Russell, W. H. Stovall, and H. P. Reid appeared, and as individuals and members of an executive committee appointed at a mass meeting of the several owners of the lands charged with the payment of the assessment, asked an injunction against the collection of the assessment that had been made, setting forth in their petition why the proceedings

were illegal and unjust. The amount with which the petitioners, as individuals, were severally charged was as follows: Russell $7.58, Stovall $205.14, and Read, who was assessed only as an agent or attorney, $229.29. No single individual among all the parties represented by the committee could in any event be made liable for an amount exceeding twenty-five hundred dollars. On the presentation of the petition the court granted a preliminary injunction, but on final hearing that injunction was dissolved and the petition dismissed. From the last order this appeal was taken, which the appellee now moves to dismiss because the amount in dispute between him and any one of the several persons charged with the payment of the assessment is less than five thousand dollars.

This motion is granted. While the appellants, and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body. The proceeding on the part of the appellee was to require each of the several land-owners in the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily be to prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in Paving Co. *v.* Mulford, 100 U. S., 148; Seaver *v.* Bigelow, 5 Wall., 208; Rich *v.* Lambert, 12 How., 347; Stratton *v.* Jarvis, 8 Pet., 41, and Oliver *v.* Alexander, 6 Pet., 143, such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal. Although the amount due the appellee from the levee district

exceeds five thousand dollars, his claim on the several owners of property is only for the sum assessed against them respectively. Any owner can relieve himself and his property from all further liability for the district by paying his part of the assessment.

DISMISSED.

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD, AND ROSANNA CRAWFORD v. JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE, AND JOHN FORSYTHE.

March 13, 1882.

The acceptance of security and signing of a citation by the circuit judge is in legal effect the allowance of an appeal, and no formal order of allowance is necessary.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss.

John S. Monk, for appellants.

Edwin F. Bayley, for appellees.

WAITE, C. J.—This is a motion to dismiss because the appeal was not taken within two years after the entry of the decree.

It appears from the record that the decree was entered on the 2d of August, 1879, and on the same day the complainants prayed an appeal, which was allowed upon their giving bond according to law. No bond was ever given under this allowance, and the case was not docketed here at the October Term, 1879. On the 1st of August, 1881, the circuit judge approved a bond for an appeal from the decree and signed a citation. The bond was on the same day filed with the clerk, and the citation served on the 18th of August. On the 8th of October the Circuit Court entered an order allowing the appeal *nunc*

pro tunc as of August 1. The case was regularly docketed in this court on the 13th of October.

The motion is denied. The circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary. (Sage *v.* Railroad Company, 96 U. S., 714; Draper *v.* Davis, 102 U. S., 371.) The appeal was, therefore, taken in time. The order of October 8 was not required to give it effect.

DENIED.

THE UNITED STATES v. RICHARD W. TYLER.

March 13, 1882.

1. Army officers retired from actice service with reduced pay are still in the service, and are entitled to the increased pay which the law allows for every five years' service while in that condition as well as when in active service.
2. The ten per centum increase of pay which the statute allows for every period of five years is to be computed on the sum primarily fixed as salary per annum, with the increase for each five years previously earned added to that sum, when its increase for any new period of five years is to be computed.

APPEAL from the Court of Claims.

S. F. Phillips, *Solicitor-General*, and *George C. Wing*, for appellants.

R. B. Warden, for appellee.

R. W. Tyler, pro se.

MILLER, J.—This is an appeal from the Court of Claims, and the question to be decided is whether the appellee, who, on the 15th day of December, 1870, was retired from the army of the United States with the rank of captain, on account of wounds received in battle, is entitled to the benefit of the statute which increases the pay of officers by ten per cent. for every period of five years' service.

The law for this increased compensation is thus expressed in the Revised Statutes:

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service.

"SEC. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum of their current yearly pay of the grade as prescribed by law."

These sections are taken from the act of July 15, 1870, and constituted the law on that subject when the appellee was retired, and their proper construction is the measure of his rights in this controversy. Section 1276 of the Revised Statutes was section 24 of the same statute, and is in the following language: "Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

Section 1275 provides that "officers wholly retired from the service shall be entitled to receive upon their retirement one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement."

There is, therefore, a manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service.

In the latter case such reward or compensation as Congress thought proper to bestow, namely, one year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended. In the former case the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only.

The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that ac-

count. As long as the service continues, the increased pay applies whenever it amounts to five years.

The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

The provisions of the statutes and the uniform treatment of these officers are conformable to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit.

Section 1094 of the Revision designates specifically, by a catalogue of twenty-eight items, of what the army of the United States consists, and the twenty-seventh item of this enumeration is "the officers of the army on the retired list."

They are, then, by law a part of the army.

Section 1256 enacts that "officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the army register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof."

Section 1259 declares that they may be assigned to duty at the Soldiers' Home, and section 1260, that they may be detailed to serve as professors in any college.

It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who

may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent., that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per centum for each five years' service applies to the years so passed in the service after retirement as well as before.

We also hold that the words "current yearly pay," in section 1262, require that, when the increased pay for any period of five years is to commence, the ten per centum must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent. previously earned for periods of five years, constitute the current yearly pay on which said ten per centum is to be calculated.

The judgment of the Court of Claims is affirmed.

AFFIRMED.

JAMES GREENWOOD v. THE UNION FREIGHT RAILROAD COMPANY.

March 13, 1882.

1. Where the Legislature of a State has repealed the charter of a street railroad company, and transferred its franchises and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity, who asks an injunction on the ground that the repealing statute impairs the obligation of a contract. 29 Eng R 280
2. Such a statute does impair the obligation of the contract of the charter, unless there is reserved to the Legislature the right to repeal the statute under which the company was organized.

3. In the State of Massachusetts such a reservation becomes part of every act of incorporation, by virtue of the following language in section 41, chapter 68, of the General Statutes, to wit: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature." The court here gives a history of the origin of this and similar clauses of reservation in the statutes of the States.
4. The effect of the repeal of an act of incorporation under such a clause is that the statute no longer exists, and whatever force the law may give to transactions entered into, and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.
5. The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal; and if the Legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power.
6. If the repeal of the old corporation was within the power of the Massachusetts Legislature, it could charter a new one, and confer the same powers on it as the former had possessed, and, so far as the property or franchises of the old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor.
7. A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States if it provides for compensation for the property of the extinct corporation so taken by the new one.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

George F. Edmunds and *A. B. Wentworth*, for appellant.

W. G. Russell and *D. E. Ware*, for appellee.

MILLER, J.—The appellant, Greenwood, a citizen of the State of New York, brings his bill of complaint, in the Circuit

Court for the District of Massachusetts, against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name, and against the directors of the Marginal Freight Railroad Company, all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal company, was organized under an act of the Legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal company, by virtue of a provision in its charter, purchased and paid the Commercial company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the Legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal company, and to take possession of the track of that and any other street railroad company on payment of compensation. This latter act also repealed the charter of the Marginal company.

Sections four, six, and seven of this act constitute the foun-

dation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal company, and, as they are short, they are here given verbatim:

"SEC. 4. Said corporation may, within its authorized limits, and for the purpose of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.

"SEC. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

"SEC. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an 'Act to incorporate the Marginal Freight Railway Company,' and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed."

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also set outs a vote or res-

olution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal company, shows no right to sustain the bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in Hawes *v.* The Contra Costa Water-works Company, in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is whether the features of that act to which complainant objects in his bill are beyond the power of the Legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two:

1. The repeal of the charter of the Marginal company.

2. The authority vested in the Union company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal company is void under the Constitution of the United States as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in section 41 of chapter 68 of the General Statutes of Massachusetts in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature.

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended, that is, it may be changed, by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease

to be a law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the Legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal company, we cannot doubt the authority of the Legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. (Crease *v.* Babcock, 23 Pickens, 334; Erie & N. E. R. R. Co. *v.* Casey, 26 Penn. St., 287; Pennsylvania College Cases, 13 Wall., 190; 2 Kent's Comm., 306.)

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union company the right to seize the track and other property of the Marginal company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate *that* branch or feature of the statute may depend somewhat upon the *effect* of the repealing clause upon the rights of the Marginal company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the Legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the Legislature.

The forty-first section of chapter 68, as we have cited it, had

a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists; its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means

within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of Wales *v.* Stetson, 2 Mass. R., 146, the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the Legislature in the act of incorporation." In the case of Dartmouth College *v.* Woodward, 4 Wheaton, 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligations of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in Fletcher *v.* Peck and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by

the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the Legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State Legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the Legislature was enacting a charter for a corporation, a provision in the statute reserving to the Legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of Wales *v.* Stetson, 2 Mass. R., 146.

It would seem that the States were not slow to avail themselves of this suggestion; for while we have not time to examine their legislation for the result, we have, in one of the cases cited to us as to the effect of a repeal, a case from 1 Paige's Chancery Reports, 102, in which the Legislature of New Jersey, when chartering a bank with a capital of $400,000, in 1824, declared by its seventeenth section that it should be lawful for the Legislature at any time to alter, amend, and repeal the same. And Kent, (2 Commentaries, 307,) speaking of what is proper in such a clause, cites as an example a charter by the New York Legislature, of the date of February 25, 1822. How long the Legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it

is unnecessary to inquire; for in 1831 it enacted as a law of general application that all charters of corporation thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the Legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. (Pennsylvania College Cases, 13 Wall., 190; Tomlinson *v.* Jessup, 15 Wall., 454; Railroad Co. *v.* Maine, 96 U. S. R., 499; Sinking Fund Cases, 99 U. S. R., 700; Railroad Co. *v.* Georgia, 98 U. S. R., 358; McLaren *v.* Pennington, 1 Paige Ch., 102; Erie & N. E. R. R. *v.* Casey, 26 Penn. St., 287; Miners' Bank *v.* United States, 1 Greene, (Iowa,) 553; 2 Kent's Comm., 306, 307.)

It results from this view of the subject that whatever right remained in the Marginal company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets or any of the streets of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts Legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal company. Whether this action was oppressive or unjust in view of the public good, or whether the Legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be sup-

posed, if answer were required to the complainant's bill, that it was made to appear that the Marginal company had shown its incapacity to fulfill the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfill a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Section 4 of the act gives this power to the Union company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. (West River Bridge Co. *v.* Dix, 6 How., 507; Central Bridge Corporation *v.* Lowell, 4 Gray, 482; Boston Water-Power Co. *v.* B. & W. R. R. Co., 23 Pickering, 360; Richmond Railroad Co. *v.* The Louisa R. R. Co., 13 How., 83.)

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the act, *shall* take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a

permission to take the track on payment of compensation, it is still a favor to the Marginal company to require this to be done within four months.

A suggestion is made that the Marginal company acquired by purchase, for $15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal company's charter which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways withdraws it from the operation of the forty-first section of chapter 68 of the general laws of the State. The latter clause declares *all* acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill; and it is so ordered.

AFFIRMED.

Opinion of the court.

CHARLES T. ROOT, EXECUTOR OF THOMAS SAYLES, DECEASED, v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY.

March 13, 1882.

The court, after reviewing the decisions on the rule of damages for infringements of patents and the various cases in England and America on the subject of the chancery jurisdiction as founded on the want of a complete remedy at law, decides:

1. That a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained:

2. That such relief ordinarily is incident to some other equity, the right to enforce which secures to the patentee his standing in court:

3. That the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement:

4. That grounds of equitable jurisdiction may, however, arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his legal remedy difficult, inadequate, and incomplete; which latter cases must each rest upon its own particular circumstances as furnishing a clear ground of exception from the general rule:

5. That the rule holding an infringer a trustee for the patentee is a mere rule of administration, in cases where the jurisdiction to grant equitable relief is clear on other grounds, and does not confer equitable jurisdiction as creating a trust.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Albert H. Walker, for appellant.

George Payson, for appellee.

MATTHEWS, J.—The appellant filed his bill in the court below on December 9, 1878, as assignee of the letters-patent originally granted to Henry Tanner for an improvement in railroad

car brakes, dated July 6, 1852, and which, on July 5, 1866, were renewed and extended for the additional term of seven years, which expired July 6, 1873. It is averred in the bill that, by virtue of the assignments to him, the complainant was invested with all rights of action for infringements of the patent which had occurred, and particularly those of which it was alleged the defendant had been guilty from August 6, 1869, to July 6, 1873, having, as is averred, during that period, used upon its railroad cars the patented brakes, but how many, the bill states, the complainant is ignorant and cannot set forth, but avers that the number so used was large, and that defendant had derived, received, and realized great gains and profits therefrom, but to what amount he is ignorant and cannot set forth.

The prayer of the bill is that the defendants may be compelled to account for and pay to the complainant all the gains, profits, and savings which it derived, received, or realized from or by reason of the use of said brakes.

To this bill a general demurrer was filled, alleging, as grounds thereof, that the bill does not contain any matter of equity on which the court could grant any relief, and that the complainant is not entitled to the relief prayed for, because he had a plain, adequate, and complete remedy at law, and also because it appeared on the face of the bill that the causes of complaint were barred by the statutes of limitation both of the United States and of the State of Illinois.

This demurrer was sustained and the bill dismissed by the decree of the Circuit Court, now brought here for review by this appeal.

The propositions mainly relied upon by the appellee in support of the decree are, first, that after the expiration of a patent equity has no jurisdiction to entertain a bill merely for an account and the recovery of the profits of an infringer during its existence, the remedy being at law for damages; and second, that even if in certain cases such a jurisdiction exists, the present does not fall within it.

On the other hand, it is contended on the part of the appel-

lant that in cases for the enforcement of the rights of patentees resort may be had, as matter of right, to a court of equity, as a distinct head of its jurisdiction, for the mere purpose of establishing an infringement and ascertaining and recovering the profits of the infringer, upon the independent equity that he is for that purpose a trustee of his gains for the use of the true owner of the patent, and liable to account as such.

In support of this contention we are referred by counsel for the appellant to numerous decisions of the Circuit Courts, many of which, it is claimed, are directly upon the point, and to several cases in this court in which, it is alleged, the same doctrine is either virtually decided or assumed; which, it is further argued, though not supported by the modern decisions of the English chancery, is found in its earlier precedents.

An examination of the practice and opinions of the Circuit Courts undoubtedly shows much diversity, incapable of reconciliation, and makes it necessary, as far as it can be done by a deliberate judgment of this court, to remove the question out of its present uncertainty by a settlement upon some basis of principle in harmony with our system of equity jurisprudence, developed and modified by legislation. To effect this satisfactorily and intelligently, it will be necessary to review the course of legislation, and judicial decision in this court, so far as it bears upon the question, from the beginning.

Prior to the passage of the patent act of 1819, (3 Stat. L., 481,) Congress had passed three laws, in execution of the power conferred by the Constitution itself, and in furtherance of the policy thereby indicated, to secure to inventors an exclusive right of property in their inventions. The first of them, the act of 1790, (1 Stat. L., 109,) gave as a remedy for its violation an action at law upon the case for damages, and forfeited the infringing article. The next was the act of 1793, (1 Stat. L., 318,) which fixed the rule and measure of damages recoverable in an action at law upon the act at three times the price at which the patentee had usually sold or licensed to other persons the use of the invention. This was changed

by the act of 1800 (2 Stat. L., 37) to three times the actual damage sustained by the patentee by reason of the infringement. By neither of these acts, however, was any jurisdiction conferred upon the courts of the United States in equity.

To vest such jurisdiction by reason of the subject-matter, as a case arising under the laws of the United States, to be exercised in controversies between parties, without regard to difference of citizenship, it was held by Mr. Justice Livingston, in the case of Livingston *v.* Van Ingen, 1 Paine, 45, required the express authority of an act of Congress; and the parties in that case not being citizens of New York, the bill was dismissed. The controversy was thereupon renewed in the courts of that State, and the chancellor having refused the injunction asked for, it was brought by appeal into the court for the correction of errors. (9 Johnson, 507.) It was there objected that the right in question rested upon statute alone, which prescribed remedies at law for its violation, which, it must be deemed, were intended to be exclusive. But the decision affirmed the jurisdiction. "The principle is," said Chief Justice Kent, page 587, "that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed until the opponent has fairly tried them at law and overthrown their pretension." The same learned judge refers also to the practice of the Federal courts in granting injunctions under the patent law, mentioning two instances—one, the case of Morse *v.* Reid, an injunction bill filed in 1796 to restrain the invasion of a copyright; the other, Whitney *v.* Fort, in which an injunction was granted to restrain the violation of the patent for the cotton-gin. Of course, in those cases the jurisdiction of the court depended on the citizenship of the parties.

Congress then passed the act of February 15, 1819, which enacted that the Circuit Courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or in-

ventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors secured to them by any law of the United States, on such terms and conditions as the said courts may deem fit and reasonable."

In the case of Sullivan *v.* Redfield, 1 Paine, 441, which was decided in 1825, Mr. Justice Thompson, who in the Livingston case had sat as one of the judges of the State court, had occasion to consider the nature of the equity jurisdiction in patent suits. "The equity jurisdiction," he said, "exercised by the court over patents for invention is merely in aid of the common law, and in order to give more complete effect to the provisions of the statute under which the patent is granted." And in answer to the argument that the act of 1819 gave a peremptory right to an equitable remedy by virtue of the patent itself, he said: "This act does not enlarge or alter the powers of the court over the subject-matter of the bill or the cause of action. It only extends its jurisdiction to parties not before falling within it. Before this act it had been held that a citizen of one State could not obtain an injunction in the Circuit Court for a violation of a patent right against a citizen of the same State, as no act of Congress authorized such suit. This act removed that objection and gave the jurisdiction, although the parties were citizens of the same State. But in the exercise of the jurisdiction in all cases of granting injunctions to prevent the violation of patent rights the court is to proceed according to the course and principles of courts of equity in such cases. So that the questions presented in the present case are precisely where they would have been without this act."

The substance of the act of 1819 was incorporated into the seventeenth section of the patent act of July 4, 1836, (5 Stat. L., 117,) so far as it related to inventors, but remained in force after the passage of the latter act, so far as it gave cognizance

to the courts of the United States of cases of copyright. It was under that provision of the act of 1819 that the case of Stevens *v.* Gladding, 17 Howard, 447, arose and was decided. That was a bill for an injunction to restrain the violation of a copyright, and prayed for the recovery of the penalties given by the seventh section of the act of February 3, 1831, and for general relief. Mr. Justice Curtis, delivering the opinion of the court, said: "There is nothing in this act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must, therefore, be rejected. The remaining question is whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for general relief. The right to an account of profits is incident to the right to an injunction in copy and patent right cases," —citing Colburn *v.* Simms, 2 Hare, 554; 3 Dan. Ch. Pr., 1797. "And this court has held in Watts *v.* Waddle, 6 Peters, 389, that where the bill states a case proper for an account, one may be ordered under the prayer for general relief."

The seventeenth section of the act of 1836 differs from the act of 1819 in one other particular only: it makes the jurisdiction in patent causes of the courts of the United States exclusive.

It was under the act of 1836 that the question arose for the first time, in Livingston *v.* Woodworth, 15 Howard, 546, as to the rule for computing the profits of an infringer, upon a decree for such an account. The bill was for an injunction and account. The validity of the patent and the fact of infringement were both admitted by the defendant, who consented to a decree requiring him to account for and pay over the gains and profits made by him during the infringement, in accordance with the prayer of the bill. The decree confirmed the

report of the master, who awarded not actual gains and profits, but such as he estimated the defendant might have made by due diligence. It was argued, in support of the decree, that where the court has jurisdiction to give the principal relief sought, it will make a complete decree and give compensation for the past injury, as in bills for specific performance and injunction bills for waste; and that it was a correct rule to hold the party accountable, as an involuntary trustee, for what the patentee might have realized by the same exercise of the right, as a court of equity sometimes forces the character of a trustee upon an intruder, or wrong-doer, or one in possession under color of right, or who takes rents or profits belonging to another, or might have taken them, as in cases of mortgagees; but it was admitted that the case was of first impression. The decree upon this point was reversed. The court said (p. 559): "We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts. * * * * If the appellees, the plaintiffs below, had sustained an injury to their legal rights, the courts of law were open to them for redress, and in these courts they might, according to a practice which, however doubtful in point of essential right, is now too inveterate to be called in question, have claimed not compensation merely, but vengeance, for such injury as they could show they have sustained. But before a tribunal which refuses to listen even to any save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which *ex æquo et bono* is theirs, and nothing beyond this." The account was, therefore, restricted to the actual gains and profits of the appellants during the time their machine was in operation.

This rule in relation to the profits recoverable in such suits was followed in Dean *v.* Mason, 20 Howard, 198, which was a case of a bill for an injunction and account, in which a decree *pro confesso* had been taken. The final decree was entered, on

the report of the master, for the estimated amount of profits which the defendant, with reasonable diligence, might have realized; not what in fact he did realize. This was held to be erroneous. The court said: "The rule in such a case is the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent. It takes away the motive of the infringer of patented rights by requiring him to pay the profits of his labor to the owner of the patent. Generally this is sufficient to protect the rights of the owner; but where the wrong has been done under aggravated circumstances, the court has the power under the statute to punish it adequately by an increase of the damages."

The important case of Seymour *v.* McCormick, 16 Howard, 480, was decided in 1853. That was an action at law. The court below instructed the jury that the actual damages to which the plaintiff was entitled, for an infringement of a patent for an improvement in a machine, might be determined by ascertaining the profits which in judgment of law he would have made, provided the defendants had not interfered with his rights, and that the same rule applied whether the patent covered an entire machine or merely an improvement on a machine. This instruction this court held to be erroneous, and reversed the judgment on that account. Mr. Justice Grier, in delivering the opinion of the court, referred to the rule of damages, prescribed by the acts of Congress, previously in force, stating that "experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits;" and that it was to obviate this that the patent act of 1836 confined the jury to the assessment of actual damages, leaving it to the discretion of the court to inflict punitive damages to the extent of trebling the verdict. He then pointed out that "it must be apparent to the most superficial observer of the immense variety of patents issued every day that there cannot, in the nature of things, be any one rule of damages which will

equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted;" that a man who invents or discovers a new composition of matter, or an entire new machine, may find his profit to consist in a close monopoly, the patentee being himself able to supply the whole demand at his own price, in which cases "the profit of the infringer may be the only criterion of the actual damage of the patentee;" that "one who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement; and where the profit of the patentee consisted neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Stimpson's patent for a turn-out in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damages to the amount of the profits of his railroad, nor could the actual damages of the patentee be measured by any known ratio of the profits of the road. * * * It is only where, from the peculiar circumstances of the case, no other rule can be found that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact." Accordingly it was held in New York *v.* Ransom, 23 Howard, 487, where the rule in Seymour *v.* McCormick, *supra*, was expressly approved, that, in an action at law, if the plaintiff rested his case, after proof of infringement merely, he was entitled only to nominal damages. It was also applied in Jones *v.* Moorehead, 1 Wall., 155, which was a bill in equity for an injunction and an account, where a decree for a large sum as profits had been rendered against the defendant, upon an

entire machine, in respect to which it appeared as matter of fact that the defendants had not infringed the patent sued on, but had admitted to the contrary in the answer. The court construed this admission by applying it to the smallest number of patented articles, and to the use of any part of the patent found to be valid, and reversing the decree, ordered one to be entered for a "nominal sum of one dollar for profits."

In the case of the Rubber Company *v.* Goodyear, 9 Wall., 788, which was a bill for an injunction and account, a decree for a large sum was rendered in favor of the complainants, which was affirmed on appeal. "The rule," said Mr. Justice Swayne, delivering the opinion of the court, "is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty and invite to aggression. The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume; and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender."

The case of Mowry *v.* Whitney, 14 Wall., 620, was also a bill in equity for an injunction and account. A decree was rendered in favor of the complainant for all the profits on the manufactured article, instead of upon the patented process of manufacture, with interest added. On appeal this court reversed the decree on that point, saying: "The question to be determined in this case is what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits. * * * * That advantage is the measure of profits." On the question of interest, Mr. Justice Strong, speaking for the court, said: "We add only that, in our opinion, the defendant should not have

been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance."

In the case of Packet Company *v.* Sickles, 19 Wall., 611, which was an action at law, the rule established in Seymour *v.* McCormick, *supra*, was reiterated as "the established criterion of damages in cases to which it was applicable." "In cases where there is no established patent or license fee in the case, or even an approximation to it, general evidence must necessarily be resorted to," as was said by the court in the case of Suffolk Company *v.* Hayden, 3 Wallace, 315. "And what evidence," said Mr. Justice Nelson, in that case, (p. 320,) "could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner by the piracy instead of the purchase of the use of the invention." He added that "a recovery does not vest the infringer with the right to continue the use, as the consequence of it may be an injunction restraining the defendant from the further use of it."

In Packet Company *v.* Sickles, *supra*, Mr. Justice Miller said: "The rule in suits in equity, of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It

is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the chancellor, the rule of assuming profits as the ground-work for estimating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity."

The doctrine of this case was reiterated in Burdell *v.* Denig, 92 U. S., 716, where Mr. Justice Miller, again delivering the opinion of the court, said:

"Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies universally and mainly to cases in equity, and is based on the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes,—a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and employes. On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained."

The case of Littlefield *v.* Perry, 21 Wallace, 205, was one where the patentee, by force of an agreement, held the legal title to the patent in trust for the complainant, in violation of which he was making use of his legal rights. It was held upon a bill filed for an injunction and account that it was a case under the patent laws, and the defendant was required to account for the profits he had made, according to the rule in

Opinion of the court.

Mowry *v.* Whitney, *supra*. The chief justice said (p. 230): "Profits actually realized are usually, in a case like this, the measure of unliquidated damages. Circumstances may, however, arise which would justify the addition of interest in order to give complete indemnity for losses sustained by willful infringements."

On July 8, 1870, Congress passed the act to revise, consolidate, and amend the statutes relating to patents and copyright. (16 Stat. L., 198.) The fifty-ninth section renewed the provision previously in force—that damages for infringement might be recovered by action on the case, and that whenever, in any such action, a verdict shall be rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of the verdict. The fifty-fifth section is as follows:

"That all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any District Court having the power and jurisdiction of a Circuit Court, or by the Supreme Court of the District of Columbia, or of any Territory; and the court shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same, or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case; but all actions shall be brought during the term for which the

letters-patent shall be granted or extended, or within six years after the expiration thereof."

These provisions are substantially carried into the Revised Statutes, section 59 of the act of 1870 being section 4919 of the latter, and section 55 corresponding to section 4921, Revised Statutes, except as to the provision in respect to the limitation upon the right to sue, which is not found in the Revised Statutes. But the rights of the parties in the present suit arose while the act of 1870 was in force, and are determinable under it.

In the case of Birdsall *v.* Coolidge, 93 U. S., 64, it is declared, in reference to the effect of the act of 1870, that "gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent;" in which event the provision is that the complainant "shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby."

Mr. Justice Clifford, in the opinion in this case, quotes a passage, slightly altered, from Curtis on Patents, section 341*a*, fourth edition, page 461, which, taken by itself, might seem to imply that prior to the act of 1870 the owner of a patent had the election to resort to a court of equity for the recovery of profits, or a court of law for damages, irrespective of any other relief of an equitable character; but the language of the passage is to be restrained to mean merely that the option existed to sue at law for past infringement, or seek equitable relief by way of prevention, the damages or profits following, as either jurisdiction is resorted to, each according to its kind. For if this be not so, it follows that since the passage of the act of 1870 an owner of a patent may recover, in a suit in equity, profits and damages in all cases, according to the rule above stated, without seeking any other relief whatever, the effect of which would be to give two remedies, one in equity, the other at law, merely for the recovery of damages for an injury to a

legal right—an anomaly not to be found in any other branch of our jurisprudence. And manifestly, upon such a construction, the action at law would soon become obsolete, as completely as if it had been abolished by legislation. The whole force of the change in the statute consists in conferring upon courts of equity, in the exercise of their jurisdiction in administering the relief which they are accustomed and authorized to give, and which is appropriate to their forms of procedure, the power not merely to give that measure of compensation for the past, which consists in the profits of the infringer, but to supplement it, when necessary, with the full amount of damage suffered by the complainant, and which, if he had sued for that alone, he would have recovered in another forum, with power to increase the amount of the actual damages, as in courts of law. But as the account of profits previously was the incident of the suit, and not its object, so now the power to award damages and to multiply them is added as an incident to the right to an account.

But the difference between the state of the law before and after the act of 1870 finds its best illustration in a comparison between two cases, both of which were decided at the October Term, 1877—Elizabeth *v.* Pavement Company, 97 U. S., 126, and Marsh *v.* Seymour, Id., 348.

In the former the bill was filed before the passage of the act, but prayed, besides an injunction, for both damages and profits. It was held that the court below had rightly decided that a decree for profits alone could be rendered, inasmuch as the jurisdiction of courts of equity to decree damages, as distinct from profits, was first conferred by the statute. Mr. Justice Bradley, delivering the opinion of the court, remarking that the general question of the profits recoverable in equity by a patentee was surrounded with many difficulties, which the courts had not yet succeeded in overcoming, said:

"But one thing may be affirmed with reasonable confidence, that if an infringer of a patent has realized no profit from the use of an invention, he cannot be called upon to respond for

profits; the patentee, in such case, is left to his remedy for damages. It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of the invention, although from other causes the general business of the defendant, in which the invention is employed, may not have resulted in profits, as when it is shown that the use of his invention produced a definite saving in the process of manufacture. (Mowry *v.* Whitney, 14 Wall., 620; Cawood Patent, 94 U. S., 695.) On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits none can be recovered. The same result would seem to follow where it is impossible to show the profitable effect of using the invention upon the business results of the party infringing. It may be added, that where no profits are shown to have accrued, a court of equity cannot give a decree for profits by way of damages, or as a punishment for the infringement. (Livingston *v.* Woodworth, 15 How., 559.) But when the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits, if he elects that remedy. And in such a case the defendant will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions. (Rubber Company *v.* Goodyear, 9 Wallace, 788.)" And these general propositions, he added, will hardly admit of dispute.

Accordingly, in that case the bill was dismissed as to the city of Elizabeth, which had infringed, because it appeared that it had made no profit from the use of the patented improvement, while a decree was rendered against the contractor, who had laid the pavement which was the subject of the patent, because he was shown to have made profits from the infringement. The municipal corporation, of course, remained liable to respond in damages, in an action at law, for any loss which the plaintiff could have established by proof.

The cases of Marsh *v.* Seymour, *supra*, arose under the act

of 1870, and were bills for injunction and account. Decrees were rendered in favor of the complainant, and a reference ordered to a master to state an account of profits. In both cases, the respondents showing that they had made no profits by reason of the use of the invention, the complainant waived his claim for a recovery on that account, and decrees were rendered for damages on the basis of a license fee for the infringing machines which had been sold, and nominal damages for those manufactured but not sold. These decrees were affirmed, the court saying, Mr. Justice Clifford delivering its opinion, that "damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits, as in the case before the court."

In the case of Parks *v.* Booth, 102 U. S., 96, which was a suit in equity for an injunction, an account of profits and damages, under the act of 1870, a decree was rendered in favor of the complainant, and for profits and damages as found by a master. Under the head of damages there were included items for expenses in conducting the suit, being counsel fees, compensation for the complainant's time, and interest on the profits. The decree was modified on appeal, by striking out all these allowances, except that for the complainant's time lost in attending to the suit. Interest on profits was disallowed on the authority of Silsby *v.* Foote, 20 Howard, 386, on the ground that profits in such a case are to be regarded in the light of unliquidated damages. No injunction was decreed, as the term of the patent had expired. It does not appear from the report of the case when the suit was begun, but a reference to the original record shows that the bill was filed in April, 1871, before the expiration of the term of the patent.

The case of Hendrie *v.* Sayles, 98 U. S., 546, was a bill in equity for an account of profits, filed after the expiration of the patent, the same patent on which the present suit is founded. It was decided upon a single point raised on demurrer to the

bill, the question of jurisdiction not being noticed either by counsel or court. A decree for the complainant was affirmed on appeal.

This appears to be the only case of the kind, until the present, that found its way into this court.

The case of Eureka Company *v.* Bailey Company, 11 Wall., 458, is no exception to this remark; although in respect to it the observation has been made that the injunction prayed for in that case was incidental to the account and not *vice versa.* That, however, is a misconception; for, unless upon the ground of a difference of citizenship, the court would not have had jurisdiction to entertain the bill in that case if it had not prayed for an injunction. For the mere purpose of enforcing the contract for the royalty, it was not a case arising under the patent laws, so as to give jurisdiction to the courts of the United States. It was because the defendant was guilty of an infringement of the complainant's patent that he was suable in equity in these courts, and to restrain that an injunction was asked until he should pay what he had promised. The object of the suit doubtless was to collect the royalty, but it was sought by means of, and therefore as an incident to, the jurisdiction of the court, invoked for the purpose of enjoining the continuance of what, until the royalty was acknowledged and paid, was found to be an infringement.

All the acts of Congress relating to patents, prior to that of 1870, contained provisions specifying the special defenses which might be made in an action at law for an infringement, under the plea of the general issue, notice thereof having been previously given. The sixty-first section of the act of 1870 enumerates the several special matters thus authorized to be proved, and adds, for the first time in the history of this legislation, the clause that "the like defenses may be pleaded in any suit in equity for relief against an alleged infringement, and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect."

The plain and obvious purpose of this provision is to furnish

appropriate modes in equity pleading for the trial of all issues, both of fact and law, relating both to the alleged infringement and the validity of the patent, without the necessity of framing special issues out of chancery for trial by jury, or sending the parties to a court of law for the trial of an action in that forum, in order to determine their legal right. It proceeds upon the idea that the court of equity, having acquired jurisdiction for the purpose of administering the equitable relief sought by the bill, may determine directly and for itself, in the same proceeding, all questions incidental to the exercise of its jurisdiction, notwithstanding they may be questions affecting legal rights and legal titles.

Although this was the first statutory authority for the practice, it was rather a recognition of what had already been established than its introduction; for the practice had, in fact, originated long before, and was based upon well known principles of equity jurisprudence. Whatever question may have existed in reference to it previously, was settled in the courts of the United States by the decision in Goodyear *v.* Day, 2 Wall., Jr., C. C. Rep., 283, a case argued by Webster & Choate, and decided by Mr. Justice Grier in 1852. That learned judge on that occasion said: "It is true that in England the chancellor will generally not grant a final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal; it is a practice founded more on convenience than necessity. It always rests on the sound discretion of the court. A trial at law is ordered by a chancellor to inform his conscience, not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact or of legal titles." (See also Orr *v.* Merrill, 1 Wood. & Minot, 376.)

The distinction in the nature of the two proceedings, of an action at law and a suit in equity, is plainly pointed out in this section of the statute, the former as being an action for an infringement, the latter as a suit for relief against an alleged

infringement. And while, upon the words used in the fifty-fifth section of the act, it may be that the jurisdiction in equity which is thereby conferred is not exhausted by the power to grant injunctions according to the course and principles of courts of equity to prevent the violation of any right secured by patent, yet the statute immediately says that it is upon a decree being rendered in any *such* case for an infringement—as though that was the only one—that the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.

It is impossible, we think, to maintain the claim that the language of this act, similar in that respect to the previous acts of 1819 and 1836, conferring jurisdiction in patent cases in equity as well as at law, was meant to obliterate the distinctions between these two jurisdictions, or even to confuse the boundaries between them, as it is alleged was done by the decision in the case of Nevins *v.* Johnson, 3 Blatch., 80, and perhaps in other subsequent Circuit Court decisions. Indeed it is the settled doctrine of this court that this distinction of jurisdiction between law and equity is constitutional to the extent to which the seventh amendment forbids any infringement of the right of trial by jury, as fixed by the common law. And the doctrine applies in patent cases as well as others. This court said in Parsons *v.* Bedford, 3 Peters, 446, speaking of the meaning intended by the framers of that amendment, that "by common law they meant what the Constitution denominated in the third article LAW, not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered." The rule was repeated in Fenn *v.* Holme, 21 Howard, 484, in this language: "In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be

found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration, with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery in England."

It becomes necessary, therefore, to consider what support there is in the general doctrines of equity for the contention of the appellant.

It is the fundamental characteristic and limit of the jurisdiction in equity that it cannot give relief when there is a plain and adequate and complete remedy at law; and hence it had no original, independent, and inherent power to afford redress for breaches of contracts or torts by awarding damages; for to do that was the very office of proceedings at law. When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid multiplicity of suits and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but requiring an account of profits, on the ground that if any had been made it was equitable to require the wrong-doer to refund them, as it would be inequitable that he should make a profit out of his own wrong. As was said by Vice-Chancellor Wigram in Colburn *v.* Simms, 2 Hare, 543, "the court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book," but, "as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged."

Whether a bill for an account of profits against a wrong-doer would lie, independently of other equitable grounds for the intervention of the court, is a question, as was said by Lord Chancellor Brougham in Parrott *v.* Palmer, 3 Mylne & Keen, 640, "which has been oftentimes agitated, and has perhaps never re-

ceived a clear and a general decision; that is to say, a distinct judgment on the general proposition, with its limitations." He concluded that, "from the whole, it may be collected that although as to timber there exists considerable discrepancy, yet the sound rule is to make the account the incident and not the principal, where there is a remedy at law; but that mines are to be otherwise considered, and that as to them the party may have an account even in cases where no injunction would lie."

The supposed exception in cases of mines seems to rest upon a *dictum* of Lord Hardwicke in Jesus College *v.* Bloom, 3 Atkyn, 262, that "it was a sort of trade;" but the reference is to the case of Bishop of Winchester *v.* Knight, 1 P. Wms., 406, where the bill prayed for an account of ore dug by the ancestor of the defendant, in respect to which the argument was that, being a personal tort, it died with the person. The decision was that the plaintiff was not entitled, but on this point the lord chancellor said: "It would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his life-time and dies, that in this case I would be without remedy. It is true as to the trespass of breaking up meadow or ancient pasture ground, it dies with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's life-time, the executor, if assets are left, ought to answer it." It is plain from these observations that the assumed ground of the equity jurisdiction was the absence of any remedy at law. (Powell *v.* Aiken, 4 Kay & Johns., 343.) It is now clearly established in the English chancery "that a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as an incident to an injunction, and that when the plaintiff has no right to an injunction he has no right to an account, and his remedy is at law alone." (Per Sir Wm. M. James, L. J., in Higginbotham *v.* Hawkins, L. R., 7 Ch. App., 679.)

The same rule is applied by the modern decisions in cases of mines, where, as incident to the relief sought by a bill, an account is asked of profits against trespassers. It appears that as to the mode of assessing compensation in such suits to an owner of coal which has been improperly worked by the owner of an adjoining mine, a different principle is applicable when the coal is taken inadvertently, or under a *bona-fide* belief of title, and when it is taken fraudulently, with knowledge of the wrong. In cases of the latter description, at law, the strict rule of damages laid down in Martin *v.* Porter, 5 M. & W., 351, was to charge the value of the coal without allowing any of the expenses of getting it; but in those of the former description a milder rule was applied in Morgan *v.* Powell, 3 Q. B., 278, and Wood *v.* Morewood, 3 Q. B., 440, which was to give to the plaintiff the fair value of the coals, as if the coal-field had been purchased from him by the defendant. This distinction was adopted and the latter rule applied, in equity, by Vice-Chancellor Malins in Hilton *v.* Woods, L. R., 4 Eq., 432, and by Lord Chancellor Hatherley in Jegon *v.* Vivian, L. R., 6 Ch. App., 742, the latter remarking that "this court never allows a man to make profit by a wrong." This rule was adopted in Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass., 86.

The same rule applies in England in patent and copyright cases. The Vice-Chancellor Page Wood, in Smith *v.* The London and Southwestern Railway Co., Kay's Rep., 415, said: "The true ground of relief in these cases is laid down in Bailey *v.* Taylor, 1 Russ. & M., 75, where Sir J. Leach, M. R., says: 'The court has no jurisdiction to give to a plaintiff a remedy for an alleged piracy unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.' Unless that primary right to an injunction exists, this court has no

jurisdiction with reference to a mere question of damages." The vice-chancellor further observed that, as had often been stated by Lord Eldon, as the object of the court in interfering by injunction was the prevention of a multiplicity of suits, which might be rendered necessary by continued infringements of the patent, he was at a loss to see how the jurisdiction could attach or the relief by injunction be arrived at, after the expiration of the patent, unless a case were made out of a numerous series of past infringements, from which the parties were still deriving advantage. He then referred to Crossley *v.* Beverly, Webs. Pat. Cas., 119, as a case where there was a specific ground for that relief, that the defendants had been manufacturing the patented articles secretly and fraudulently for the purpose of pouring into the market the articles so manufactured, directly the patent should have expired. In that case the bill was filed before the expiration of the patent, and the right to sue having been thus acquired, the court extended it to restrain using the articles so manufactured after the patent had expired. "Such a case," continues the vice-chancellor, "of a fraudulent attempt to evade the patent might occur as would enable the court to restrain the use of articles made in infringement of the patent and kept back until it expired, even after its expiration, and the plaintiff having thus obtained a right to the injunction, the right to an account would follow."

In the case of Price's Pat. Candle Co. *v.* Bauwen's Co., 4 Kay & Johnson, 727, the bill was dismissed because, the patent having expired *pendente lite*, the relief by injunction could not be granted at the hearing; but in Davenport *v.* Rylands, L. R., 1 Eq. Cas., 302, the same judge retained the bill, under similar circumstances, for the purpose of an inquiry as to damages, because the act of 21 and 22 Vict., c. 27, commonly called Cairn's act, passed after the former decision, had altered the rule. That statute declared that in all cases in which the court has jurisdiction to *entertain an application* for an injunction against a breach of any covenant, contract, or agreement,

or against the commission or continuance of any wrongful act, or for the specified performance of any covenant, contract, or agreement, the same court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct,—a provision which no doubt suggested the like extension of the jurisdiction of the court in patent cases, contained in our patent act of 1870. But, even after the passage of Cairn's act, it was decided by Vice-Chancellor Sir Wm. M. James, in Betts *v.* Gallais, L. R., 10 Eq. Cas., 392, that the court would not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent, when the bill had been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction. He characterized it as "a mere device to transfer a plain jurisdiction to award damages from the court to which that jurisdiction properly belongs, to this court."

Mr. Kerr, in his treatise on Injunctions, 41, summarizes the result of many decisions, which he cites, under this statute, as follows:

"The statute did not transfer to the court the general jurisdiction of common law by way of damages, or extend its jurisdiction to cases where previously to the statute it had no jurisdiction, or could not, consistently with its rules and principles, have interfered. The statute merely empowered the court to give damages in cases involving elements or ingredients of an equitable character. If the case as presented to the court was an equitable one, so that the subject-matter of the application is properly cognizable in equity, the court had jurisdiction under the statute to entertain the question of damages. If, on the other hand, the plaintiff had no equitable right at the time of bringing the action, so that the matter has been improperly brought into equity, the statute had no application. Damages may be awarded under the statute if it appear that at the time of bringing the action there was an equitable case,

although the case for an injunction fails, or although an injunction is not competent from circumstances which have occurred since the filing of the bill."

It will be observed that the British statute does not touch the question of the account of profits by an infringer, leaving that as it stood before the passage of the act. The unavoidable inference is that damages can only be given, under the act, in cases in which an account might be decreed; and that the patentee must, as it was expressly decided by the House of Lords, in De Vitre *v.* Betts, L. R., 6 H. L., 321, in all cases when he has a decree, elect whether he will have an account of profits or an inquiry as to damages, and cannot have both. Under the act of Congress of 1870, he may recover damages in addition to the profits to be accounted for by the defendant; but as the recovery is limited by the act to the actual damages, it is manifest that the recovery of damages and profits is not intended to be double, but that when necessary the damages are to supplement that loss of the complainant which the profits found to have been received are insufficient to compensate, subject to the power of the court as to their increase, as in case of verdicts.

This firm and indisputable doctrine of the English chancery has been recognized and declared by this court, in Hipp *v.* Babin, 19 Howard, 271, to be part of the system of equity jurisprudence administered by the courts of the United States, founded not only upon the legislative declaration in the judiciary act of 1789, "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," but also upon the intrinsic distinctions between the different jurisdictions of law and equity. In delivering the opinion of the court in that case, Mr. Justice Campbell remarked that "the practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule, or is modified by local circumstances or local convenience;" and cited the instances in which "this

court has denied relief in cases in equity, where the remedy at law has been plain, adequate, and complete, though the question was not raised by the defendants in their pleadings nor suggested by the counsel in their arguments." He then adds: "And the result of the argument is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." It was contended in that case that, notwithstanding this general principle, the bill ought to be maintained, because the complainants, being minors, were authorized to call upon the defendants, who had intruded into possession of their lands, for an account as guardians, and that the court of chancery was better fitted to take an account for rents, profits, and improvements, and might decide the question of title as incidental to the account.

In reply to these points, Mr. Justice Campbell remarked that "there are precedents in which the right of an infant to treat a person who enters upon his estate, with notice of his title, as guardian or bailiff, and to exact an account in equity for the profits for the whole period of his occupancy, is recognized." "But," he added, "in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown." "Nor can the court retain the bill under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits, and improvements. The rule of the court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause. But when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not

give a plain, adequate, and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account."

These principles were announced in a case for the recovery of the possession of real estate held adversely, but they are of general application, and embrace as well the case of torts to personalty, and infringements of patent and copy rights.

The distinct ground upon which the opposite view is presented to us in argument is that the infringer of a patent right is, by construction of law, a trustee of the profits derived from his wrong, for the patentee," and that a court of equity, in the exercise of its acknowledged jurisdiction over trusts and trustees, will require him to account as trustee, without reference to any other relief. And in support of this contention we are referred to passages in the judgments of this court in the cases of Packet Co. *v.* Sickles, 19 Wall., 611; Burdell *v.* Denig, 92 U. S., 720, and Birdsall *v.* Cooledge, 93 U. S., 68, all of which have been already cited in this opinion.

But the inference sought to be drawn from the expressions referred to is not warranted. It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account of the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. That would be a *reductio ad absurdum*, and, if accepted, would

extend the jurisdiction of equity to every case of tort where the wrong-doer had realized a pecuniary profit from his wrong. All that was meant in the opinions referred to was to declare according to what rule of computation and measurement the compensation of a complainant would be ascertained in a court of equity, which having acquired jurisdiction upon some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action. The rule adopted was that which the court in fact applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage; that is, to require them to refund the amount of profit which they have actually realized. This rule was adopted not for the purpose of acquiring jurisdiction, but, in cases where, having jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, at the election of the complainant, for the purpose of preventing multiplicity of suits. And the particular rule was formulated, as will be seen by reference to the cases already referred to, out of tenderness to defendants, in order to mitigate the severity of the punishment to which they might be subjected in an action at law for damages, and because it was thought more equitable merely to deprive them of the actual profits arising from their wrong than to make no allowances, in estimating damages, for the cost and expense of the business in the prosecution of which they had violated the rights of the complainant. The same reason operated in the establishment of the similar rule acted upon in the cases of Hilton *v.* Woods, L. R., 4 Eq., 432, and Jegon *v.* Vivian, L. R., 6 Ch. App., 742, already cited in a previous part of this opinion. The rule itself is reasonable and just, though sometimes perverted and abused. It has been constantly acted upon by the courts. But it is a rule of administration and not of jurisdiction, and, although the creat-

ure of equity, it is recognized as well at law as one of the measures, though not the limit, for the recovery of damages.

The case is not within the principle according to which, in certain circumstances, a court of equity decrees a wrong-doer to be a trustee *de son tort*, and exerts its jurisdiction over him in that character. Where a defendant has wrongfully intermeddled with property already impressed with a trust, he may be required as a trustee to account for it, as was done in the case of The People *v.* Houghtaling, 7 California, 348, because trust property may be followed, wherever it can be traced, into whosesoever possession it comes, except that of a *bona-fide* purchaser without notice. It is the character of the property, and not the wrong done in converting or withholding it, that constitutes the wrong-doer a trustee.

Our conclusion is that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule.

The case of Garth *v.* Cotton, 1 Dickens, 183, furnishes an interesting and curious illustration of one of the excepted cases. In that case Lord Hardwicke sustained a bill in equity, in a

case of waste, for an account of timber felled and sold, where there could be no injunction, in favor of a complainant unborn at the time of its commission, whose estate was a contingent remainder, supported by a limitation to trustees to preserve it, the defendant being the owner of a prior term of years, and the ultimate remainder-man in fee. The lord chancellor proceeded on the ground of collusion between the defendants and a nominal or imputed breach of trust on the part of the trustees to preserve the contingent remainder in permitting the wrong; and distinguished the case from Jesus College *v.* Bloom, 3 Atk., 262, particularly on the ground that the complainant could have no remedy at law. Another instance of an exception is mentioned by Vice-Chancellor Page Wood in the extract from his judgment in the case of Smith *v.* The London and Southwestern Railway Co., Kay's Rep., 415, contained in a previous part of this opinion.

It does not appear from the allegations of the bill in the present case that there are any circumstances which would render an action at law for the recovery of damages an inadequate remedy for the wrongs complained of; and, as no ground for equitable relief is presented, we are of opinion that the Circuit Court did not err in sustaining the demurrer and dismissing the bill. Its decree is therefore affirmed.

AFFIRMED.

AUGUSTUS H. BURLEY, ASSIGNEE IN BANKRUPTCY OF DAVID KRIEGH, v. JAMES L. FLINT, EXECUTOR OF THOMPSON J. S. FLINT, DECEASED.

March 13, 1882.

A bill of review which prayed to have so much of a decree set aside as denied the statutory right of redemption given by the State law in cases of foreclosure of a mortgage, *dismissed*, it appearing that the party wishing to redeem did not make the offer to redeem in the time required by the statute, and the court holding that he could not make such offer after such time had expired, and that therefore it could serve no good purpose to set aside such decree, even if erroneous.

Opinion of the court.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Francis H. Kales, for appellant.

E. B. McCagg, for appellee.

MILLER, J.—Flint, the appellee, obtained in the Circuit Court of the Northern District of Illinois, on the 19th of October, 1877, a decree foreclosing a mortgage against Kriegh, the mortgagor, Burley, his assignee in bankruptcy, and others. The decree ordered a sale according to the usual course and practice of the court, which, in the case of Brine *v.* The Insurance Company, 96 U. S. R., 627, we held to mean a sale without any right of redemption. Such a sale was made to Flint, and an order of confirmation, and for a deed, and for delivery of possession, and expressly cutting off all right of redemption, was entered by the court on the 13th day of March, 1878, with a further decree against the assignee for payment out of assets, *pro rata*, of a balance not satisfied by the sale.

On the 17th day of October, 1879, Burley, the assignee, filed in the same court, but without leave, a bill of review, seeking to reverse so much of the former decrees of the court as denied the statutory right of redemption given by the laws of Illinois in regard to the land sold under such decrees.

A hearing was had on a motion to dismiss this bill, which, by consent of counsel, as the record states, was to be treated also as a demurrer, and the court dismissed the bill, from which order this appeal is prosecuted.

The appellant in his bill does not seek to reverse the order of sale to satisfy the amount found due to Flint; nor does he ask that the sale made under that order be set aside and a new sale ordered; nor does he make any offer to redeem by payment of the amount found by the court to be due on the original mortgage; nor does he offer to pay the amount bid at the sale by Flint, the mortgagee, or tender any sum in court as assurance that he will do so. He simply and purely

asks that so much of the decree as forecloses this statutory right to redeem may be reviewed and reversed.

What will such an order avail him? The decree and the sale under it will still stand good. The time within which defendant can redeem by the statute of Illinois has long since passed, and he has made no offer to redeem. The sale was made prior to the 23d of February, 1878, the date of the master's report, and the present bill filed October 17, 1879, twenty months afterwards, and at a time when, by the statute, both the defendant and his judgment creditors had ceased to have any right of redemption.

If appellant had appealed from the original decree to this court his remedy was plain, and the decree would have been reversed. The same result would probably have followed an appeal from the order confirming the sale and cutting off the right to redeem. He did not see proper to follow such a course, but seeks by this bill of review to let the original decree stand, to let the sale stand, but to have a declaration of court that the order foreclosing the statutory right of redemption be reversed.

How can this avail him, since his time for redemption was passed before he filed his bill? It would be of no use to him unless the court should go further and make a decree that he *now* has the right to redeem in the same manner as if he had tendered the money within the twelve or the fifteen months which the law allowed for that purpose.

We do not think the court should decree that he may now redeem on payment of the sum bid and interest. If he designed to avail himself of the right of redemption purely statutory, he should bring himself within the terms of the statute.

Such is the view of a case precisely similar taken by the Supreme Court of Illinois.

That court, in the case of Suitterlin *v.* The Connecticut Mutual Insurance Company, 90 Illinois, 483, while recognizing the doctrine of the case of Brine *v.* The Insurance Company, holds that the party seeking to redeem under such a decree

and sale as the one before us, can do so only by making the offer within the time prescribed by the statute, and cannot do so afterwards. We concur in that view, and affirm the decree of the Circuit Court in this case.

AFFIRMED.

REBECCA B. YOUNG, EXECUTRIX OF JOHN H. YOUNG, DECEASED, v. THE AMERICAN STEAMSHIP COMPANY.

March 13, 1882.

The exemption allowed by section 4513 of the Revised Statutes of the United States from the fee of two dollars allowed the shipping commissioner for services in shipping crews, extends to a reshipment on all voyages succeeding in regular order the one for which fees are paid, and is not limited to the one next succeeding.

ERROR to the Supreme Court of the State of Pennsylvania.

Henry Flánders, for plaintiff in error.

Morton P. Henry, for defendants in error.

FIELD, J.—The defendant in the court below, John H. Young, who died since this case has been pending here, was appointed shipping commissioner of the United States at the port of Philadelphia in July, 1872, and was continuously in office from that time until the present action was commenced, in March, 1876. The plaintiff in the court below is a corporation created under the laws of Pennsylvania, and during the period the deceased held his office was the owner of four steamships sailing under the American flag between the ports of Philadelphia and Liverpool. The men composing the crews of the steamships were shipped before the commissioner for a voyage from Philadelphia to Liverpool and back; and for every man shipped on each voyage the commissioner received from the company the sum of two dollars, the payment of which was demanded by him by virtue of his office.

The total number of men shipped at Philadelphia, on board these steamships, between the dates mentioned, was six thousand one hundred and thirty-six; of which number two thousand four hundred and thirty-nine reshipped and sailed on the next succeeding voyage of the same steamship on which they had returned to that port. For these the commissioner demanded and received from the company four thousand eight hundred and seventy-eight dollars, payments being made from time to time, as the bills were presented by him, immediately after the reshipment of the men.

The present action was brought in the Court of Common Pleas of the county of Philadelphia to recover this sum, and was submitted for decision upon an agreed statement of facts. That court held that the payments were voluntary, and that the money, therefore, could not be recovered back. The case being carried to the Supreme Court of the State, the decision of the Court of Common Pleas was reversed, and judgment ordered for the plaintiff for the amount claimed. To review this judgment the case is brought here.

Two questions were presented for consideration to the Supreme Court of the State: first, whether the shipping commissioner was entitled to charge a fee of two dollars for each seaman who, on the return of a vessel of the company to Philadelphia, reshipped and sailed on the same vessel in succeeding voyages; and second, whether, if the fees collected by him were illegally exacted, they could be recovered back, it not appearing that any objection was made at the time to their payment. That court decided both questions in favor of the company, and the same questions are now presented to us.

The Revised Statutes require the several Circuit Courts of the United States, within whose jurisdiction there is a port of entry and of ocean navigation, to appoint a shipping commissioner for it; and empower them to regulate the mode of conducting business in his office, and to exercise full control over it. (Sec. 4501.) They also require him to take an oath

of office, and to give a bond, with sureties, in such sum as the circuit judge may prescribe, not less than five thousand dollars, for the faithful discharge of his duties. (Sec. 4502.) They provide, with certain exceptions not necessary to be stated in this case, that the master of every vessel bound from a port in the United States to any foreign port shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, which must contain various particulars relating to the nature and probable duration of the voyage contemplated, the port or country where it is to terminate, the number and description of the crew, the time when the seaman is to be on board to begin work, the capacity in which he is to serve, the wages he is to receive, the provisions with which he is to be furnished, and regulations as to his conduct, and to the fines and punishments to which he may be subjected, and stipulations as to advance and allotment of wages. (Sec. 4511.) The agreement, except as otherwise specially provided, is to be signed in duplicate in the presence of the commissioner, acknowledged before him, and certified under his hand and official seal, one copy of which is to be retained by him and the other to be delivered to the master of the vessel. (Sec. 4512.) For each seaman thus shipped the commissioner is allowed a fee of two dollars.

But the statutes also declare that these provisions as to the duty of the master and the contract with the seamen shall not apply to masters of vessels in cases where the seamen are, by custom or agreement, entitled to participate in the profits or results of a cruise or voyage, nor to masters of coastwise or lake-going vessels that touch at foreign ports; but that "seamen may by agreement serve on board such vessels a definite time, or, on the return of any vessel to a port in the United States, may reship and sail in the same vessel on another voyage without the payment of additional fees to the shipping commissioner by either the seaman or the master." (Sec. 4513.)

The solution of the first question presented depends upon

the construction given to this last clause. The contention of the commissioner is that the exemption from payment of fees on the reshipment is limited to the reshipment for one other voyage, and to that immediately following the one at which the fees were paid. On the other hand, the contention of the steamship company is that the exemption applies to a reshipment for all voyages succeeding the first one in regular order. We are of opinion that this latter construction is the correct one.

The legislation of Congress was designed for the protection of seamen in the merchant service; they had previously been the subject of constant imposition and deception. As a class, particularly those serving as common sailors, they are proverbially improvident, and frequently the prey of unscrupulous landsmen. Soon stripped when in port of their hard earnings, they are generally willing to accept employment on almost any terms. Their necessitous condition often compelled them to submit to harsh contracts which placed them completely in the power of masters of vessels. To remedy these evils the office of shipping commissioner was created; and he is charged with the performance of important duties connected with the shipment and discharge of seamen. Every engagement for their service must be made and signed before him. But when, satisfied with the vessel upon which they have served and with the treatment received, they are disposed to continue in the employment of the same owners, they can have no occasion for his services. All that is then required of him is to see that the renewed contract is signed and acknowledged in his presence. The exemption of the reshipment from fees was undoubtedly made, as suggested by the Supreme Court of Pennsylvania, to encourage a more steady and continuous service, and to make it for the interest of masters to so treat their crews as to induce them to remain with the vessels. This object requires the extension of the exemption to a reshipment on all voyages succeeding in regular order the one for which fees were paid, equally as to the one next succeeding. Every

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reshipment must by its terms be only for another voyage, not for several voyages. So, upon a strict construction, as well as upon a view of the intention of the exemption, the same result must follow. No reason can be assigned why the exemption should extend to the first reshipment on the same vessel that will not apply to all subsequent reshipments following continuously.

It is of no weight against this construction of the statutes that it may deprive the commissioner of fees to an extent materially affecting his compensation. Statutes are not to be wrested from their true meaning because a diminution of the fees of an office may result from it.

It follows that we agree with the Supreme Court of the State on the first question presented. Upon the second question, whether the payments were voluntary, and, therefore, the money could not be recovered back, we express no opinion; for, in any view in which it may be considered, it is not one of Federal law. The ruling of the State court on this point is final, so far as we are concerned in this action.

Judgment affirmed. AFFIRMED.

THE NATIONAL STEAM NAVIGATION COMPANY v. JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, ET AL.; AND JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, ET AL. v. THE NATIONAL STEAM NAVIGATION COMPANY.

March 20, 1882.

1. The limited liability act of 1851, reproduced in the Revised Statutes in sections 4282, &c., applies to owners of foreign as well as domestic vessels, and to acts done on the high seas as well as in waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or, perhaps, of two foreign nations having the same maritime law.
2. The maritime law of the United States, as found in the statute, is the same as the general maritime law of Europe, and is different from that of Great Britain in this: that the former gauges the liability by

the value of the ship and freight after the loss or injury, and the latter by their value before the loss or injury, not exceeding £15 per ton.

3. The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. The principles laid down on this subject in Norwich Co. *v.* Wright, 13 Wall., 116, and in The Lottawana, 21 Wall., 558, reasserted and affirmed.
4. The courts of every country will administer justice according to its laws, unless a different law be shown to apply; and this rule applies to transactions taking place on the high seas. If a collision occur on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws, unless the two colliding ships belong to the same foreign country, or, perhaps, to different countries using the same law, when they will be governed by the laws of the country to which they belong.
5. Ship-owners may avail themselves of the defense of limited responsibility by answer or plea as well as by the form of proceeding prescribed by the rules of this court, at least so far as to obtain protection against the libelants or plaintiffs in the suit. Those rules were not intended to restrict them, but to aid them in bringing into concourse those having claims against them arising from the acts of the master or crew.
6. If the owners plead the statute, a decree may be made requiring them to pay into court the limited amount for which they are liable, and distributing the said amount *pro rata* amongst the parties claiming damages. Such a proceeding in a court of admiralty would be an "appropriate proceeding" under the statute.
7. It is not necessary that ship-owners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if found in or confessing fault, may abide a decree against them for the value of ship and freight as found by the proofs.
8. The rule of damages in case of goods lost or destroyed on the high seas by the fault of those in charge, is the price or value of the goods at the place of shipment, with all charges of lading, insurance, and transportation, and interest at six per cent. per annum, but without any allowance for anticipated profits.
9. When the goods have no market value at the place of shipment, resort may be had to other means of ascertaining their actual value, such as the price which they usually bring at the port of destination, with a fair deduction for profits and charges.

APPEALS from the Circuit Court of the United States for the Eastern District of New York.

Opinion of the court.

John Chetwood, Thomas E. Stillman, and *William A. Butler,* for the Steam Navigation Company.

James C. Carter and *Benedict, Taft & Benedict,* for Dyer and others.

BRADLEY, J.—The steamship Scotland, belonging to the National Steam Navigation Company, a corporation of Great Britain, sailed from New York for Liverpool on the 1st of December, 1866, with freight and passengers; and after reaching the high sea, opposite Fire Island light, ran into the American ship Kate Dyer, bound from Callao, in the Republic of Peru, to New York, laden with a cargo of guano. The Kate Dyer immediately sank, and ship and cargo were totally lost. The steamship suffered so severely from the collision that she put back, but was unable to get further that the middle ground outside and south of Sandy Hook, where she also sank and became a total loss, with the exception of some stripping of ship's material, consisting of anchors, chains, rigging, and cabin furniture got from her by the Coast Wrecking Company before she went down. Libels *in personam* were filed in the District Court for the Eastern District of New York against the Steam Navigation Company by the owners of the Kate Dyer, the Peruvian Government, owner of her cargo, and by a passenger and some of the crew who lost certain effects by the sinking of the ship. Personal service of process not being obtainable, the marshal attached another vessel belonging to the steamship company lying in the port of New York, which was duly claimed and released on stipulation, and the steamship company appeared and responded to the libel. The answer admitted the collision, but denied that the Scotland was in fault, and further alleged as follows: "Respondents, further answering, say that said steamer Scotland was by said collision sunk and destroyed, and that there is no liability *in personam* against these respondents for said loss of the Kate Dyer." Proofs being taken, the District Court rendered a decree in

favor of the libelants, which, on appeal to the Circuit Court, was substantially affirmed. The owners of the Kate Dyer were awarded fifty-six thousand dollars with interest; the owners of the cargo, fifty-seven thousand three hundred and seventy-five dollars with interest; and the passengers and crew upwards of eleven thousand dollars with interest.

On the trial in the Circuit Court the respondents, besides contesting the question of fault and general liability, again insisted upon the benefit of the limited liability law, and proposed for adoption by the court a certain finding of fact and conclusion of law looking to that end. The finding of fact was substantially adopted by the court, as follows:

"The steamer was, by reason of the said collision and in consequence thereof, so injured that although at once put about she could only reach the 'outer middle,' so called, on the west side of the channel south of Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging, and cabin furniture, of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up. The passage-money paid in advance by the passengers was one thousand seven hundred and three dollars and sixty-five cents; of this two hundred and twenty-five dollars was refunded to such of them as could not wait to be transported by the respondents in another vessel of their line; the remaining passengers were forwarded by the Queen and the expense charged to the Scotland. Irrespective of the carriage of the passengers by the Queen, the respondents paid return money as above, two hundred and twenty-five dollars, and the expenses of bringing the passengers to New York and taking care of them before they were reshipped, five hundred and sixty-six dollars and eighty-three cents—in all, seven hundred and ninety-one dollars and eighty-three cents; the balance of the passage-money, nine hundred and eleven dollars and eighty-two cents, was credited to the Queen and charged to the Scotland."

The conclusion of law proposed and insisted on by the respondents as legitimately arising upon this fact was as follows, to wit:

"The liability of the respondents, as owners of the said steamship Scotland, did not extend beyond the value of their interest in the vessel and her pending freight at the time of the collision; and the vessel having been lost by the collision, and no freight or passage money earned, the respondents are thereby discharged from any liability on account thereof."

The Circuit Court, as before stated, refused any relief grounded on the limited liability law, but made a decree against the respondents for the total amount of damages sustained by the various parties in interest. To this conclusion the respondents excepted.

Both parties appealed from the decree, and the case is now before us for review. The appeal of the libelants was based on what they supposed to be an erroneous conclusion of the court in reference to the allowance of interest and the estimation of the value of the cargo.

The principal question raised and argued on this appeal is whether the steamship company is entitled to the benefit of a limited responsibility equal to the value of the steamship and freight after the collision occurred, a liability which, in this case, as the vessel and freight were a total loss, would only amount to the value of the articles saved by the wrecking company. It is contended by the company that it is entitled to the benefit of such limitation either under the general maritime law or under the act of Congress of 1851. On the other side it is contended that the general maritime law on this subject—if there be any—is not in force in this country, and that the benefit of the act of Congress cannot be claimed by foreign vessels. It is further contended by the libelants that the steamship company, even if it might have had the benefit of the rule, failed to take the proper steps for obtaining it,—first, in not filing a petition according to the rules of this court; and

secondly, in not surrendering the property recovered from the wreck, or its proceeds.

In the case of The Norwich Company *v.* Wright, 13 Wall., 116, we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. This rule is laid down in several places in the ancient code called the Consolato del Mare, and in many other authorities, which are quoted and commented upon by Judge Ware in the case of The Rebecca, Ware's Reports, 187; and it is specifically formulated in various national ordinances and codes, amongst others in the Marine Ordinance of Louis XIV, adopted in 1681. Emerigon, in his treatise of Contracts "a la Grosse," says: "The owners of the ship are bound *in solidum* by everything which the captain does in the course of the voyage for the promotion of the voyage. * * But this action *in solidum* does not exist against the owners farther than according to the interest which they have in the body of the ship; hence if the ship perish, or if they abandon their interest, they are no longer liable for anything. It is thus that the maritime laws of the Middle Age have directed; such is the law which is observed in the North, and such is the regulation of our own ordinance;"—and he refers to the Consolato and other authorities. The text of the French ordinance, which is regarded as merely formulating the old customary law, is as follows: "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

But whilst this is the rule of the general maritime law of Europe, it was not received as law in England, nor in this country, until made so by statute. The English statutes, indeed, have not yet adopted to its full extent the maritime law on this subject. They make the owners responsible to the value of the ship and freight at the time of the injury—that is, immediately before the injury—although the ship be

destroyed or injured by the same act, or afterwards in the same voyage; whilst our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port, and the freight actually earned; and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be; and, without such surrender, subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster.

But whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in The Lottawana, 21 Wall., 558, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. Then, does it govern the present case?

In administering justice between parties it is essential to know by what law, or code, or system of laws their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties

would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum—that is, the maritime law as received and practiced therein—would properly furnish the rule of decision. In all other cases each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.

The act of Congress creating a limited responsibility of shipowners in certain cases, first passed March 3, 1851, and reproduced in sections 4282–4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that "the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such

owner in such vessel and her freight then pending." This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, "Men would be deterred from owning and operating ships if they were subject to the fear of an indefinite liability for the acts of the master." (Jure B. & P., lib. II, c. XI, s. 13.)

But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor.

English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which, in generality of terms, were similar to our own, did not apply to foreign ships. (See The Nuestra Signora de los Dolores, 1 Dods., 297; The Carl Johan, 1 Hagg., 113; The Girolamo, 3 Hagg., 186; The Zollverein, Swabey, 96; Cope *v.* Doherty, 4 K. & Johns., 367; S. C., 4 Jur., N. S., 451; S. C. on App., Id., 391; S. C., 4 Jur., N. S., 699; The Gen. I. S. C. Co. *v.*

Schurmanns, 1 Johns. & Hem., 193; The Wild Ranger, 1 Lush., 553; 9 Jur., N. S., 134.) We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this: that the British Legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign States, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged; and this they cannot do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty.

The English courts say that as foreigners are not subject to their law, nor entitled to its benefits, they will resort to the general law of general liability when foreigners are litigants before them. Where do they find such general law? In the law of nature? or the civil or common law? Is not the maritime law, as their own Legislature or national authority has adopted it, as imperative as either of these? Does it not, in the British judicial conscience, stand for the law of nature, or general justice? As for the civil and common laws, they are only municipal laws where they have the force of laws at all. The better grounds for the English decisions seem to be the peculiar terms of the acts of Parliament on the subject,

and the supposed policy of those acts, as being intended for the encouragement of the British marine. From these considerations, as grounds of construction, the conclusion may have been properly deduced that the law was intended to be confined to British ships. The question, it is true, has ceased to be of practical importance in England since the act of 1862, (25 and 26 Vict., c. 63,) by which the owners of any ship, British or foreign, are not to be answerable, without their actual fault or privity, for any loss or damage, to person or property, to an amount exceeding £15 per ton of the ship's registered tonnage, or its equivalent, in case of foreign ships. But the former English decisions are thought to have a bearing on our law, because the acts of Parliament to which they related, in their principal clauses, were conceived in the same broad and general terms as our act of Congress. Some of the clauses of the British acts, however, relating to registered tonnage and other particulars, admitted only a special application to British ships; and perhaps these clauses did require a restricted construction of the whole acts to such ships.

But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of ship-owners; and public policy, in our view, requires that the rules of the maritime law, as accepted by the United States, should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicil. We think they should not be restricted by construction. Our opinion, therefore, is that in this case the National Steamship Company was entitled to the benefit of the law of limited responsibility.

But it is objected that the appellants did not properly and in due time claim the benefit of the law. Under this head

it is strenuously contended that the appellants did not comply with the rules of this court adopted in December Term, 1871. Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit of the law, but to aid them. Some form of proceeding was necessary to enable ship-owners to bring into concourse the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the law of limited responsibility, and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defense by way of answer to a libel, or plea to an action, if the ship-owners should deem such a mode of pleading adequate to their protection. It is obvious that in a case like the present, where all the parties injured are represented as libelants or intervenors in the cause, an answer setting up the defense of limited responsibility is fully adequate to give the ship-owners all the protection which they need.

But it is objected that they did not follow the statute, by giving up and conveying to a trustee the strippings of the wreck and the pending freight. It is sufficient to say that the law does not require this. It contains two distinct and independent provisions on the subject. One is, that the ship-owners shall be liable only to the value of the ship and freight; the other is, that they may be discharged altogether by surrendering the ship and freight. If they failed to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief. The primary enactment, in section 4283 of the Revised Statutes, is that the liability of

the owner for any loss or damage without his privity or knowledge shall in no case exceed the amount or value of his interest in the vessel and her freight then pending. Two modes for carrying out this law are then prescribed, one in section 4284 and the other in section 4285. By section 4284 a *pro rata* recovery against the ship-owner is given to the various parties injured "in proportion to their respective losses;" and it is added: "for that purpose the freighters and owners of the property and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

The other mode of attaining the benefit of the law is prescribed by section 4285, which declares that "it shall be deemed a sufficient compliance, on the part of such owner, with the requirements of this title, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee to be appointed by any court of competent jurisdiction, &c., from and after which transfer all claims and proceedings against the owner shall cease." This last proceeding the respondents did not see fit to adopt; but that does not deprive them of the benefit of the preceding section.

As to the form of proceeding necessary to give the respondents the benefit of section 4254, which declares that either party "may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable," what more "appropriate proceeding" could be taken for this purpose, where all the parties are before a court of admiralty, and where the ship-owners plead their exemption under the statute, than to give a decree against them for the amount of their liability, and to distribute the sum amongst the parties entitled to it?

It seems to us that no additional rules are necessary to attain the object of the law in the case. It is plain enough to execute itself. If there are parties not represented in the suit who have claims for damages, it is the respondents' fault for

not bringing them in, as they might have done after the rules of 1871 were adopted, by pursuing the remedy pointed out in those rules. But as to the actual libelants and intervenors in the suit, there is no reason in the world why the respondents should not be decreed to pay the value of the ship's strippings and remnants into court, nor why such amount should not be distributed *pro rata* amongst the claimants.

We think that this should have been done. If any further inquiries are necessary to be made in order to ascertain the proper amount to be paid by the respondents, as depending upon the value of the articles saved, including freight or passage money realized, the court below can institute them in a proper way.

The question raised as to the rule of damages which should be adopted in estimating the actual loss of the owners of the guano was properly decided by the Circuit Court. The rule is the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without any allowance for anticipated profits. When, as in this case, the goods have no ascertainable market value at the place of shipment, the guano being a natural deposit owned by the Peruvian Government, indirect means must be resorted to for the purpose of ascertaining the real value at that place. The Circuit Court had the evidence of an experienced merchant on this subject, who based his estimate upon the price for which the goods were usually sold in New York, with a fair deduction for profits and expenses of every kind. Under the circumstances of the case we do not see that any juster method could have been adopted. The rate of interest allowed, six per cent. per annum, was the proper rate in such a case. (See The Vaughan and Telegraph, 14 Wall., 258; Murray *v.* Charming Betsey, 2 Cranch, 64; The Anna Maria, 2 Wheat., 327; The Amiable Nancy, 3 Wheat., 546; Smith *v.* Condry, 1 How., 28; Williamson *v.* Barrett, 13 How., 101.)

In conclusion, our decision is, that as no error has been

shown in any part of the decree below except on the question of limited responsibility, the same is in all respects affirmed, with that exception; and for the error in that respect the decree of the Circuit Court must be reversed so far as it condemns the respondents to pay the whole amount of damage sustained by the libelants and intervenors, and the cause must be remanded with instructions to modify the decree and take such further proceedings as may be necessary to carry out the principles laid down in this opinion.

As to the costs of the litigation up to the time the appeal was taken to this court, the decree of the Circuit Court will not be disturbed, inasmuch as the respondents did not place themselves alone on the defense of limited responsibility, but contested the question of fault and any liability whatever, which was found against them.

As to the costs of this appeal, we think that no costs should be decreed to either party against the other. The question before the Circuit Court was a new one, upon which there was wide room for difference of opinion; and neither court nor parties had any precedents to guide or direct them as to the mode of proceeding. Therefore each party will be decreed to pay their own costs on this appeal.

PARTLY REVERSED.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY ET AL. v. HENRY ELLERMAN.

March 20, 1882.

1. The right of the city of New Orleans under Louisiana law is simply that of building levees and wharves on the river banks within its corporate limits for the public utility, with the exceptions established by paramount law, and of collecting reasonable wharfage for their actual use; but it has not the exclusive right to collect wharfage within such limits, and it is no violation of its rights for a corporation holding by a good title a part of the river bank to collect wharfage for its use.
2. Even if such latter corporation has not under its charter the right to collect wharfage and its acts in so doing are *ultra vires*, yet one who

is not a stockholder, and whose legal rights are not invaded by its so doing, has no such interest as entitles him to set up such alleged violation of its charter as a ground of enjoining the corporation from collecting wharfage.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

John A. Campbell, *Thomas L. Bayne*, and *John L. Cadwalader*, for appellant.

William W. King, *Robert Mott*, and *Durant & Hornor*, for appellee.

MATTHEWS, J.—The New Orleans, Mobile and Texas Railroad Company, one of the appellants and the principal defendant below, is a corporation of the State of Alabama, by the original name of the New Orleans, Mobile and Chattanooga Railroad Company, which has constructed a line of railroad from Mobile to New Orleans. It was authorized by its charter "to obtain by purchase or grant from any person or corporation, and afterwards maintain, manage, use, and enjoy any railroad property, and the appurtenances thereto, or any steamboats, piers, wharves, and the appurtenances thereto, that the directors may deem necessary, profitable, and convenient for the corporation to own, use, and manage in connection with its railroads." (Session Acts of Alabama, 1866.)

The General Assembly of the State of Louisiana, on August 16, 1868, passed an act which recognized it as a body corporate and authorized it to exercise its franchises in Louisiana, and expressly conferred upon it power "to construct, establish, or purchase in the State of Louisiana, and thereafter to own, maintain, and use suitable wharves, piers, warehouses, steamboats, harbors, depots, stations, and other works and appurtenances connected with and incidental to said railroad and the business of said company, and by the directors of said company deemed necessary and expedient for said company to own and manage."

Opinion of the court.

In 1869 it was further enacted by the Legislature of that State "that the said company, with the consent of the owners of lands fronting on any navigable water-course, or after such lands have been acquired by the company by purchase, release, donation, or in any other manner, in accordance with the laws of the State of Louisiana, may erect, construct, and thereafter maintain and use wharves, warehouses, depots, or other buildings and structures in and upon the margins, or upon that portion of the margins, reserved to public use, of any and all navigable rivers, bayous, or water-courses in the State of Louisiana, wherever the same may be deemed, by a majority of the directors of the company, necessary and requisite for the legitimate and convenient transaction of the business of the company."

On March 6, 1869, the General Assembly of Louisiana passed a joint resolution, having the force of law, granting to the railroad company "the right to inclose and occupy for its purposes and uses, in such manner as the directors of said company may determine, that portion of the levee, batture, and wharf in the city of New Orleans, between the street laid out between Pilie street and the Mississippi River, and from Calliope street to the lower line (about three hundred and fifty-five feet below Calliope street) of the batture rights owned by said company, and no steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of said company; and all steamships or vessels discharging or receiving cargo at said wharf for said company, or any steamships or vessels using said wharf, by and with the consent of said company, and not receiving or discharging cargo at or occupying any other wharf in the city of New Orleans, shall be exempt from the payment of all levee and wharf dues to the city of New Orleans. Said wharf shall be maintained and kept in repair by said company." All laws and parts of laws and all ordinances and parts of ordinances conflicting with the provisions of this joint resolution were thereby repealed.

At the date of the passage of the joint resolution the railroad company was the owner by previous purchase of the land described in it, and in possession, using it for the purposes of a depot and for other railroad purposes, and as a wharf, appropriate structures having been built for that use. A portion of this property was leased in June, 1875, by the receivers of the railroad, appointed under proceedings to foreclose, for twelve months, at the sum of seven thousand two hundred dollars, to Roberts and Witherspoon, who were made defendants to the bill, the use and employment of the wharf granted by such lease consisting "in the mooring of vessels coming to the consignment, custody, or care of the parties of the second part (the lessees), or to either of them, and the loading and unloading of cargoes upon all vessels of this kind with the full consent of the parties of the first part, exempt from wharf and levee dues, according to the terms of the said joint resolution."

The object of the bill filed by the appellee was to enjoin the execution of this contract, and the use and employment of the wharf described therein in the manner contemplated by it.

The claim of the complainant, Ellerman, the appellee, was based on a contract between himself and the city of New Orleans, entered into June 29, 1875. This contract purports to be a grant from the city to Ellerman, for a term of four years and eleven months from June 29, 1875, of the contract for building and repairing the wharves and levees according to certain specifications on file, and for the payment of debts contracted on account of them, and for transferring the revenues of the same for the said term, agreeable to the terms of a certain ordinance and resolution of the city, all which are set out in the contract. The specifications state the particulars of the required repairs and extensions of the wharves. The subject-matter of the ordinance is declared to be the sale of "the revenues of the wharves and levees of the city of New Orleans, collectible under existing ordinances upon all ships, vessels, steamships, steamboats, flatboats, and water-craft of any and every description, upon the terms and conditions" therein set

forth. The purchaser was to assume certain specified liabilities of the city connected with the wharves, and it was provided that the sale should be awarded to the bidder who would assume to discharge the obligations set forth, in consideration of the transfer of the revenues assigned, in the shortest time. The purchaser should be subrogated to all the rights and privileges of the city of New Orleans, to sue for and collect the revenues; and it was understood and agreed that "the city undertakes to transfer only such rights as she possesses, and the purchaser takes the said revenues subject to all the rights now held by other persons by way of lease, privilege, contract, or by law, and the purchaser shall, in reference to them, be subrogated only to the rights of the city." It was provided that the purchaser should take possession of the wharves, landings, and levees in the condition in which the same might be at the time, and should repair the same and keep them in good order and condition during the term stipulated. It was further provided that if, from overpowering force, the city should not be able to protect the transferee in receiving the said revenues, or if they should by any such cause be diminished over one-third, the transferee might, after satisfying all obligations incurred under the contract up to the time, surrender it and be discharged from further responsibility; but the city, it was expressly declared, in nowise guaranteed the payment of the wharfage and levee dues, the collection of which are to be enforced by the transferee at his own cost.

The wharves and levees which constitute the subject-matter of this arrangement consisted of artificial improvements made at the expense of the city, by grading and piling, securely driven, fastened, and covered by a plank flooring, so as to furnish safe and convenient landings and moorings for water-craft, and places for loading and unloading their cargoes. Provision was made not only for keeping in repair the existing works and structures, but the transferee of the revenues was bound to build additional new wharves in certain specified districts of the city, if required to do so, not to exceed a named sum per

annum; but if new wharves should be required in other districts by the city council at their own or the request of any other person, the party so desiring them should be bound to pay for the cost thereof, and should be entitled to receive the revenues derived from such wharves during the term of contract with the transferee, unless sooner reimbursed.

The claim of Ellerman is that the administration of the wharves and levees within the city limits is intrusted by law to the municipal government; that with this administration is coupled a franchise that the city might charge and receive a reasonable remuneration for the expense of the facilities afforded to commerce; that under this franchise the city expended out of the revenues of the corporation very large sums on the wharves and levees in permanent works and improvements for the benefit of commerce; that in consequence the city had a vested right in the franchise and the revenues legitimately derived from these expenditures, of which it could not be divested by an act of the Legislature, and that the appellee, by virtue of his contract, is subrogated during its term to the rights of the city.

He further claims that it is a violation of these rights for the defendants to permit the use and employment of their property as a wharf, and to charge and receive wharfage for such use, by and from persons not engaged in conducting the proper business of the railroad company, thus opening a rival wharf business in competition with the city of New Orleans and the appellee, as its lessee; and that if the joint resolution of March 6, 1869, must be construed so as to confer upon the railroad company any such authority, it is null and void, because contrary to that provision of the Constitution of the United States which forbids the taking of private property without due process of law.

It is not claimed that the city has ever used as a public wharf the premises so occupied by the appellants, or made any expenditures for works and constructions upon them; and it is admitted that all expenditures of that description which

have been made thereon have been at the cost of the railroad company.

A decree was rendered in the Circuit Court in favor of the appellees, granting the relief prayed for; to review which this appeal is prosecuted.

In the opinion of the circuit judge, (2 Woods C. C. Rep., 120,) the case turned upon the construction to be given to the joint resolution of March 6, 1869; and being of opinion, upon the authority of the decision of the Supreme Court of Louisiana in the case of The City of New Orleans *v.* The New Orleans, Mobile and Chattanooga Railroad Company, 27 La. Ann., 414, that this resolution conferred upon the railroad company no right to charge wharfage dues against vessels landing at said wharf which were in no way connected with the business of the railroad company, and no right to maintain a free wharf for such vessels, it was assumed that the appellee had such an interest in the question as qualified him to maintain this suit and entitled him to the relief prayed for.

The case of The City of New Orleans *v.* The New Orleans, Mobile and Chattanooga Railroad Company, *supra*, was a suit brought by the city against the railroad company to recover a sum of money for levee dues, charged against the defendant for barges and flatboats belonging to the company and lying at this wharf, and which were used in its business. The Supreme Court of the State in that case decided that the joint resolution was not void for either of the reasons urged. It said: "The public servitude along the banks of rivers in Louisiana is under the control of the General Assembly. (C. C., 453, 455, 458.) The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled. (5 Ann., 661; 15 Ann., 577; 22 Ann., 545; 6 N. Y., 523; 26 N. Y., 287.) In the case now under consideration the State granted the right to the riparian owner. This is permissible. (1 Black, 1.) Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the

river bank for public purposes, to wit, to facilitate the transaction of its business with the public. It was the control by the Legislature of a public servitude."

The extent of the rights of the railroad company under the joint resolution—whether they were limited to the use of the wharf for railroad purposes merely, or embraced its use for all purposes—was a point not involved in the case then before that court, and was not decided by it, either in express terms or by any fair inference. What that decision did affirm, however, was that the disposal of the public right in the premises, as a wharf, was in the State, to the exclusion of the city; so that if the joint resolution had been a cession to a natural person, as riparian proprietor, to improve the premises as a landing place for water-craft, and for loading and unloading cargoes, by building levees and wharves, at his own expense, with the right to charge reasonable wharfage for their use, it would have been conclusive upon the city and those claiming in its right. And construing the grant to the railroad company as limiting the use of the property as a wharf to purposes strictly incident to its corporate business, still, in order that it should be beneficial to that extent, it would be essential that the railroad company should have the right to exclude all other uses; and this would effectually withdraw it from the jurisdiction of the city authority over the general subject of the public wharves.

Neither would this be in derogation of any vested right of the city. Whatever powers the municipal body rightfully enjoys over the subject is derived from the Legislature of the State. They are merely administrative, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation which it is allowed by law to charge for the actual use of structures provided at its expense for the convenience of vessels engaged in the navigation of the river. (Cannon *v.* New Orleans, 20 Wall., 577.)

And while it may be true, as was decided by the Supreme Court of Louisiana in Ellerman *v.* McMains, 30 La. Ann., 190, that the city cannot lawfully be required to permit the use of its wharves, without compensation, on the ground that they are private property, it is equally true, as was decided by the same court in The City of New Orleans *v.* Wilmot, 31 La. Ann., 65, that the city cannot forbid any water-craft from using the banks of the navigable waters of the State for purposes of navigation and commerce, and cannot compel them to pay to it wharfage except as compensation for the use of wharves of which it is the proprietor.

The rights of the city in respect to this controversy would seem, then, to be reduced to that of building levees and wharves on the banks of the river within its corporate limits for the public utility, with the exceptions established by paramount law, and collecting reasonable wharfage for the actual use of such structures. Its right to build a wharf upon the land of the railroad company, the appellant, we have seen, is excluded by the terms of the joint resolution of March 6, 1869, according to its narrowest construction.

The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the railroad company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest it can only consist in preventing competition with himself, as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the railroad company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation

acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the appellant, although the railroad company may not be authorized to engage in the same business. The legal interest which qualifies a complainant, other than the State itself, to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has its legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed.

This was the principle on which this court proceeded in the case of The City of Georgetown *v.* The Alexandria Canal Company, 12 Peters, 91. It is applied in Mayor, &c., of Liverpool *v.* Chorley Water-works Company, 2 DeG., M. and G., 852; Stockport District Water-works *v.* Mayor, &c., of Manchester, 9 Jur. N. S., 266; Pudsley Coal Gas Company *v.* Corp. of Bradford, L. R., 15 Eq., 167.

On this ground it is our opinion that the appellee failed to allege and show any right to maintain his bill, which should,

therefore, have been dismissed. The decree is accordingly reversed, with directions to dismiss the bill; and it is so ordered.

REVERSED.

CHARLES HECHT v. MARY E. BOUGHTON.

March 20, 1882.

The act of Congress of April 7, 1874, in relation to appellate proceedings from territorial courts, *held* to require all cases in which there is not a trial by jury to be brought to this court by appeal, and not by writ of error; and *held* to apply to all territorial courts, and not merely to those where the distinction between suits at law and in equity had been abolished.

ERROR to the Supreme Court of the Territory of Wyoming. On motion to dismiss.

C. N. Potter and *E. W. Mann*, for plaintiff in error.

J. Thomas Turner, for defendant in error.

WAITE, C. J.—This is a writ of error to the Supreme Court of the Territory of Wyoming, to bring up for review the judgment in a suit where there was not a trial by jury. A motion is now made to dismiss because the case should have been brought here by appeal and not by writ of error.

Section 2 of the act of April 7, 1874, ch. 80, (1 Supp. Rev. Stat., 13,) is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court

on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or appeal: *And provided further*, That the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States, where the record has already been filed."

This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been, or not, a trial by jury. (Stringfellow *v.* Cain, 99 U. S., 612.) We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record, and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances the form of proceeding to get a review is not of so much importance as certainty about what is to be done.

We cannot agree with counsel for the plaintiff in error that the act of Congress was intended to apply only to those Territories where the distinction between suits at law and suits in equity had actually been abolished. From the preamble it may fairly be inferred that the object of the legislation was to prevent embarrassments growing out of the mingling of juris-

dictions, but the statute as it stands clearly applies to all territorial courts.

The motion to dismiss is granted.

DISMISSED.

THE UNITED STATES v. THE UNION PACIFIC RAILROAD COMPANY.

March 20, 1882.

1. Hecht *v.* Boughton. *ante*, p. 301, followed.
2. Under sections 702 and 1909 of the Revised Statutes of the United States the amount required to appeal from the Supreme Court of Wyoming to this court is one thousand dollars, and that also in cases where the United States are appellants.

ERROR to the Supreme Court of the Territory of Wyoming.

S. F. Phillips, *Solicitor-General*, for plaintiffs in error.

Shellabarger & Wilson, for defendant in error.

WAITE, C. J.—This was a suit in replevin brought by the United States, in one of the District Courts of the Territory of Wyoming, against the Union Pacific Railroad Company to recover the possession of certain goods intended for the Indian service. The case was submitted to the court on an agreed statement of facts, from which it appears that the goods belonged to the United States; that they were intended for the Indian service; that the United States had a contract with Dwight J. McCann for their transportation from New York to the White River Agency, in Colorado; that they were put into the hands of this contractor for transportation under his contract; that the contractor agreed with the railroad company for their transportation from Omaha to Rawlins; that the company carried them as a common carrier under this agreement to the place of destination, for which its proper charges were four hundred and ninety-six dollars and eighty-six cents; that on their arrival at Rawlins they were stored in the com-

pany's warehouses for a long time; that for this storage the proper charge was ninety-one dollars and thirty cents, and that the contractor for transportation had never paid any part of these charges.

On the 20th of November, 1877, the United States demanded the goods of the company, but a delivery was refused unless the charges were paid, the company claiming the right to hold the goods under a carrier's lien. The United States thereupon replevied the goods without having first paid the charges. The only controversy was as to the lien, and it was agreed that if, upon the facts, the court should be of opinion the company had a lien, judgment should be entered in its favor and against the United States for the amount of the charges. If, however, it should be decided there was no lien, judgment was to be entered against the company. The court decided there was a lien, and gave judgment against the United States for five hundred and eighty-eight dollars and sixteen cents. This judgment was affirmed by the Supreme Court of the Territory, and for the review of that judgment this writ of error has been brought.

Under the decision in Hecht *v.* Boughton, just announced, (*ante*, p. 301,) the case should have been brought by appeal rather than writ of error. There was no trial by a jury. But there is still another objection to our jurisdiction. Under sections 702 and 1909 of the Revised Statutes, writs of error and appeals from the final judgments and decrees of the Supreme Court of Wyoming lie to this court only when the amount in controversy exceeds one thousand dollars, or the judgment is on a writ of habeas corpus, involving a question of personal freedom. No exception is made in favor of the United States, and this is not an action brought for the enforcement of any revenue law. Consequently the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party. (U. S. *v.* Thompson, 93 U. S., 588.) The value of the matter in dispute is the amount of the judgment that has been recov-

ered. This is less than one thousand dollars. It follows that we have no jurisdiction, and the writ it dismissed.

DISMISSED.

IRA DAVENPORT v. THE COUNTY OF DODGE.

March 20, 1882.

1. In Nebraska, bonds issued by authority of a vote of a precinct for public purposes must be in the name of the county of which that precinct forms a part,—a precinct being a mere subdivision of a county, and not a separate political entity,—and suit on such bonds must be against the county, the judgment to be paid by a tax levied only on the taxable property of the precinct.
2. Although the State statute authorizing the issue of such bonds provides the special remedy of a mandamus for their enforcement, yet, inasmuch as a suit to get judgment on bonds or coupons is part of the necessary machinery of the Federal courts in enforcing the writ of mandamus—which is, in such courts, in the nature of an execution, and will not be issued till judgment is obtained—a suit to obtain such judgment is maintainable.

ERROR to the Circuit Court of the United States for the District of Nebraska.

W. H. Munger and *E. Wakeley*, for plaintiff in error.

William Marshall, for defendant in error.

WAITE, C. J.—By a statute of Nebraska, passed in 1869, "to enable counties, cities, towns, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purposes," the legal voters of counties and cities were authorized to vote bonds for such purposes, and upon a favorable vote, the county commissioners in case of a county, and the city council in case of a city, were to issue the bonds as voted, which were to "continue a subsisting liability against said city or county" until paid. It was further made the duty of

the proper officer annually to cause to be levied, collected, and paid over to the holders of such bonds "a special tax on all taxable property within said county or city, sufficient to pay" the interest and principal as they fell due. Sections 6 and 7 of the act are as follows:

"SEC. 6. Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled, by mandamus or otherwise, to levy the tax herein provided to pay the same.

"SEC. 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." (Gen. Stats. of Neb., 448.)

Under the authority of section 7 bonds were issued by the county commissioners of Dodge county in the following form:

"UNITED STATES OF AMERICA,
State of Nebraska.

"It is hereby certified that Fremont precinct, in the county of Dodge, in the State of Nebraska, is indebted unto the bearer in the sum of one thousand dollars, payable on or before twenty years after date, with interest at the rate of ten per cent. per annum from date. Interest payable annually on the presentation of the proper coupons hereto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge county, Nebraska; interest payable at the Ocean National Bank in the city of New York.

"This bond is one of a series issued in pursuance of and in

accordance with a vote of the electors of said Fremont precinct at a special election held on the 11th day of November, 1870, at which time the following proposition was submitted:

"Shall the county commissioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed fifty thousand dollars, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across the Platte River, in said precinct; said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent. per annum, payable annually? Which proposition was duly elected, adopted, and accepted by a majority of the electors of said precinct voting in favor of the proposition.

"And whereas the Smith Bridge Company of Toledo, Ohio, have entered into a contract with said commissioners to furnish the necessary materials and to build and construct said bridge referred to in the foregoing proposition:

"Wherefore this bond, with others, is issued in pursuance thereof, as well as under the provision of an act of the Legislature of the State of Nebraska, approved February 15, 1869, entitled 'An act to enable counties, cities, and precincts to borrow money on their bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purpose.'

"In witness whereof we, the said county commissioners of said Dodge county, have hereunto set our hands this first day of September, A. D. 1871.

"GEORGE F. BLANCHARD,
"A. C. BRIGGS,
"JOHN P. EATON,
"*County Commissioners.*

[SEAL.] "Attest: A. G. BRUGH, *County Clerk.*"

Default having been made in the payment of sundry coupons attached to these bonds, Davenport, the plaintiff in error, brought suit against the county for the recovery thereof, in the

Circuit Court of the United States for the District of Nebraska. The petition set forth the issue of the bonds according to the facts and prayed judgment "for the sum of eight hundred and fifty dollars and costs of suit, said judgment to be collected by a tax upon the taxable property within the territory comprising said Fremont precinct at the time said bonds were voted and issued." The county demurred to the petition, and at the hearing the following questions arose:

"1. Whether upon the allegations of the amended petition filed in said court on the 12th day of May, 1881, the said county of Dodge is liable to a suit, in which judgment can be rendered against said county of Dodge, on the bonds and coupons therein declared upon and set out.

"2. Whether upon the allegations of the said petition the plaintiff is entitled to recover a judgment in form against the county of Dodge, to be satisfied or collected only by levy of a tax on the taxable property in Fremont precinct, as prayed for in said petition."

Upon these questions the opinions of the circuit justice and district judge holding the court were opposed, and that disagreement has been duly certified here. The opinion of the circuit justice being that the questions should be answered in the negative, the demurrer was sustained and judgment given for the defendant. From that judgment this writ of error has been brought, and the case is now here for determination on the certificate of division.

When county bonds are issued under the statute in question it is expressly provided that they shall constitute a debt against the county, to be paid by the levy and collection of taxes on all the taxable property within the county. If aid is voted by a precinct, bonds also are to be issued, differing only from county bonds in that they are to be paid from taxes levied on property within a precinct. "As to the several duties of the county commissioners respecting them," says the Supreme Court of Nebraska, in State *v.* Thorne, 9 Neb., 461, "the law makes no distinction whatever between precinct and county

bonds. They must issue both, and when issued it is their duty to keep a record of the kinds and amounts as well as the times and places of payment, and make provisions therefor as the statute directs. In the case of precinct bonds the means of payment must be raised by a tax levied by the commissioners 'upon the property within the bounds of such precinct,' which must be collected in the same manner as is the ordinary county revenue, and through the agency of the county treasurer, whose only duty in connection with the fund arising therefrom, when collected, is to hold it subject to the order of the county commissioners directing its application to the object for which it was intended. As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality and through precisely the same agencies as are the ordinary county funds, and, except when there is some special provision of statute authorizing it, payment therefrom can be legally made only on 'warrants by the county commissioners according to law.'"

A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. (State *v.* Dodge County, 10 Neb., 20.) Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the State. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot, says again the Supreme Court of the State, in the case last cited, "enter into contracts directly or indirectly, nor assume obligations

which a court might be called on to enforce." Hence the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation that is entered into and charged with the debt created thereby. The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment, and in the other only a part. In both the mandamus to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of an intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county payable out of a special fund to be raised in a special way. Although the form of expression in the Nebraska statute is somewhat different from that in Missouri, which we were called on to consider in County of Cass *v.* Johnston, 95 U. S., 360, we think the legal effect of it is the same. In Missouri it was provided that the bonds should be in the name of the county, but in Nebraska there can be no bond except it be of the county, and as a bond is to be made, it necessarily follows that the county must make it. In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say, county bonds, but must contain a statement of their special nature, which confines the area of taxable property to a part rather than the whole of the county.

If there is nothing else in the case, therefore, we think it comes within County of Cass *v.* Johnston, *supra*, and that an action at law will lie in the courts of the United States against the county for the recovery of the special judgment asked for.

The case of County Commissioners *v.* Chandler, 96 U. S., 205, was upon coupons attached to some of this same issue of bonds. Judgment had been rendered against the county in the court below, and that judgment was affirmed here. No one seemed to think then that the defense now relied on was good, for it was not mentioned in this court or below. The defense then made related only to the authority of a precinct to vote aid for the building of a toll bridge.

It is contended, however, that as the statute which authorizes the creation of the liability provides a special remedy for its enforcement, this suit cannot be maintained. The remedy provided is by mandamus to compel the proper officers to levy the necessary tax. In County of Greene *v.* Daniel, 102 U. S., 195, a case similar to this in many of its features, we said a suit to get judgment on bonds or coupons was part of the necessary machinery which the courts of the United States must use in enforcing this remedy, and that the jurisdiction of those courts is not to be ousted simply because in the courts of the State the mandamus could be granted without a judgment. In the State courts the liability may, as we understand the case of State *v.* Dodge County, *supra*, be determined in the proceedings for the mandamus. Such is not, however, the rule in the courts of the United States, where the writ of mandamus is only granted in aid of an existing jurisdiction. In those courts the judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect. (County of Greene *v.* Daniel, *supra;* Graham *v.* Norton, 15 Wall., 427; Bath County *v.* Amy, 13 Id., 244.) As the judgment asked for is special, and will only entitle the plaintiff to payment through the instrumentality of the special tax to be levied, the suit as it now stands is in reality only a way of getting the remedy the statute provides. The only execution that can issue on the judgment will be the mandamus.

The Supreme Court of the State in State *v.* Dodge County, *supra*, declined to issue a mandamus for the levy of taxes to pay a judgment in the Circuit Court of the United States on

some of the coupons attached to this class of bonds, and in the opinion declared the judgment a nullity; but this we must understand to mean a nullity as the foundation of any proceeding in that court for its enforcement. To enable the courts of the United States to afford the remedy which the law has specially provided, such a judgment is a necessary preliminary. In fact, a judgment is but one of the steps in the proceeding to obtain the mandamus. The statute has given a remedy by mandamus, but it has not undertaken to regulate the process by which it is to be secured. That depends on the practice established in the several tribunals from which the writ is to be obtained. The practice in the State courts requires one mode of proceeding, that in the courts of the United States another, but the result is the same in both, to wit, the order for the levy and collection of the requisite tax.

It follows that each of the questions certified must be answered in the affirmative and the judgment of the court below reversed. It is consequently so ordered, and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

THE UNITED STATES v. THE DIX ISLAND GRANITE COMPANY.

March 20, 1882.

A contract with a company furnishing building stones in which the party receiving them agreed to pay "the sum of 65 cents per cubic foot for all stones when the quarried dimensions do not exceed 20 cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding 20 feet," *construed* to mean that the additional compensation was to be estimated on every cubic foot contained in blocks exceeding 20 feet in dimensions, and not merely on every cubic foot in excess of 20 feet in such blocks.

APPEAL from the Court of Claims.

The Dix Island Granite Company, a corporation created under the laws of New York, is the owner of quarries of granite on an island off the coast of Maine called Dix Island; and on

Statement of the case.

the 1st of September, 1869, it entered into a contract with the United States to supply granite for the construction of a building for a post-office in the city of New York. By it the company agreed to deliver at the site of the building all such stone as might be required for its construction, "wrought and dressed in such manner and style of workmanship" as might be directed by the United States; and the latter stipulated to pay for the stone delivered "the sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet."

Under the contract the company delivered at the site of the post-office building, in the city of New York, 456,554 cubic feet of granite, of which quantity 353,728 cubic feet were in stones the quarried dimensions of which severally exceeded twenty cubic feet. In the settlement of the account of the company the parties disagreed in their interpretation of the last clause, as to the price stipulated per cubic foot of stones the general dimensions of which exceeded twenty feet. The Treasury Department construed the clause as allowing for each cubic foot of the stone sixty-five cents, and one cent additional for every cubic foot exceeding twenty; thus, if the stone contained twenty-one cubic feet, the price for each cubic foot of the entire stone was to be 66 cents; if it contained twenty-two cubic feet, the price for each was to be 67 cents, and so on, increasing the price one cent for each additional cubic foot. On the other hand, the company construed the clause as allowing for each cubic foot of the stone sixty-five cents, and one cent additional for every cubic foot of the entire stone; thus, if the stone contained twenty-one cubic feet, the price was to be 65 cents plus 21 cents, that is, 86 cents a cubic foot of the entire stone; if it contained twenty-two cubic feet, the price was to be 87 cents, and so on, adding to the 65 cents one cent for each cubic foot of the entire stone. The difference in the amounts

resulting from the two interpretations as to the price of the granite delivered was $70,745.74.

The amount allowed by the department was paid on account, the question of the construction of the clause being reserved for judicial decision. The company thereupon brought the present action in the Court of Claims for the difference. Other demands were also included in the action; but, as they were disallowed and the company has not appealed, no reference need be made to them. For the difference in the price of the stone, mentioned above, the company recovered judgment, and the case is brought here for review.

S. F. Phillips, Solicitor-General, for appellants.

Enoch Totten, for appellee.

FIELD, J.—The clause of the contract in question, upon the interpretation of which the determination of this case must depend, divides the stones to be delivered into two classes—those whose dimensions do not exceed twenty cubic feet, and those whose dimensions do exceed that number of cubic feet. For those of the first class the price is fixed at 65 cents a cubic foot. For those of the second class the price per cubic foot is fluctuating, increasing with the size of the stone; but the mode of ascertaining this price is prescribed. It is to add to the sixty-five cents as many cents as there are cubic feet in the stone, and this sum will constitute the price per cubic foot. The last clause must, therefore, be read as if the words "per cubic foot" were inserted in it; thus, "one cent additional [per cubic foot] for every cubic foot" of the larger stones, that is, for the whole number of such feet in the stone. It will serve to remove doubt as to the meaning of the clause if we look at it with the insertion of these words after eliminating the provision as to the smaller stones. It will then read thus: "The party of the first part hereby covenants and agrees to pay * * * the sum of 65 cents per cubic foot for all stones * * * and one cent additional [per cubic foot] for every foot" of the stones;

that is, sixty-five cents for each cubic foot plus one cent for every cubic foot in the stone. This is the interpretation for which the claimant contends, and it appears to us to be the only one permissible from the language used. The interpretation adopted by the Treasury Department requires the interpolation of terms excepting from the computation the first twenty feet; and this exception is inconsistent with the provision that for "every cubic foot" of the larger stones an additional price is to be paid.

Nor is there anything unreasonable in the increased price for the larger stones required by this interpretation. Every contract must be considered with reference to the subject in respect to which it is made, and its language construed accordingly. It was stated by counsel on the argument, and the fact is a matter of common knowledge, that with builders, material-men, and architects the value, and consequently the price, of dressed building stone per cubic foot is determined by the size of the stone, and that this value cumulates with the size; thus, the value of a cubic foot of granite in a small block—weighing a single ton, for example—is much less than the value of a cubic foot in a larger block weighing several tons. The difficulty of preparing and moving blocks weighing several tons is very much greater than that of preparing and moving an equal quantity of stone in small blocks, and the expense of time and labor must of course be proportionately greater.

The contract compelled the company to furnish "all such stone" as might be required in the construction of the post-office building. It left the size of the blocks to the direction of the United States. They might have called for blocks equal in size to some of those furnished for the building of the Treasury Department, which are said to contain five hundred and sixty-three cubic feet, and to weigh forty-seven tons. The dressing and transportation of a stone of such a size would have been very much greater than the dressing and transportation of forty-seven blocks each of a single ton. We do not, therefore, appreciate the force of the objection urged by the

government to the construction for which the claimant insists, that instead of allowing a rate gradually increasing beyond the twenty feet dimension, it requires, to quote the language of counsel, "a sudden leap at one point" when the dimensions of the stone pass the twenty cubic feet limit. Had the government called for blocks all of one hundred or more cubic feet, as it might have done, the change would have been as much against the interest of the claimant as the supposed benefit to him by the change in price at the point mentioned. The reason suggested—and we cannot say that it is not a good one—for having a fixed price for blocks not exceeding twenty feet, is that blocks of that size and weight could be handled by a known power, for which provision was made; but for moving stones of a larger size special arrangements would be required, depending upon their dimensions and weight. It may well be that at the point where stones can be readily handled, and beyond which special arrangements are required to move them, a great change should be made in the price. The company may have been indifferent as to their weight and size under a specified figure, and yet been unwilling to furnish any of a larger size without a greatly increased price.

There are many articles in commerce whose value is greatly increased by a small augmentation in size, and they are consequently sold at a cumulative price, as their dimensions are enlarged. Plate-glass is one of them; diamonds are another. Such increased value arises either from the greater rarity of the article of the larger size, or the greater difficulty in its production or transportation. The cumulative character of the price in the present case is not exceptional for the reasons mentioned, that the difficulty and expense of moving the blocks increase with their size. It is stated in the able opinion of one of the justices of the Court of Claims that the price of similar stones bought by the government for the building of the Treasury Department was seventy cents per foot for those of ten feet, eighty cents for those of twenty feet, ninety cents for

those of thirty feet, and so on; in other words, that there was a cumulative price for every additional cubic foot of the stone.

Applying the contract to the subject to which it relates, we think that the interpretation placed by the company upon the clause as to the price, was correct. The judgment of the Court of Claims must, therefore, be affirmed; and it is so ordered.

MILLER, J.—The CHIEF JUSTICE, Mr. Justice HARLAN, and myself dissent from the judgment and opinion in this case.

AFFIRMED.

WILLIAM HENRY, COLLECTOR OF THE PORT OF CHICAGO, v. MARSHALL FIELD, LEVI Z. LEITER, LORENZO G. WOODHOUSE, HENRY FIELD, HENRY J. WELLING, AND JOSEPH N. FIELD.

March 20, 1882.

Torchon laces are subject to the duty of thirty per cent. imposed on "thread lace and insertings," and not to that of forty per cent. imposed on manufactures of flax, or of which flax is the component material of chief value "not otherwise provided for."

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

S. F. Phillips, Solicitor-General, for plaintiff in error.

John H. Thompson and *Edward S. Isham,* for defendants in error.

FIELD, J.—In 1878 the defendant in the court below was collector of customs for the port of Chicago; and this action is brought to recover from him the amount of certain duties alleged to have been illegally imposed in that year upon goods of the plaintiffs. It appears that the plaintiffs imported into the United States from France certain articles invoiced as "white linen torchon laces and insertings;" that they were

brought by steamship to New York, thence transported to Chicago under internal transportation bonds, and there entered; that the defendant, as collector, decided that the goods were subject to a duty of forty per cent. *ad valorem*, under schedule C of section 2504 of the Revised Statutes, as a manufacture of flax, or of which flax was the component material of chief value "not otherwise provided for," and exacted that duty. The plaintiffs claimed that the goods were subject to a duty of only thirty per cent. *ad valorem* as "thread lace and insertings," which is the amount prescribed in the same schedule for articles of that kind. They paid the difference, ten per cent., under protest, and brought this action to recover back the amount.

On the trial the chief point in controversy was whether the laces in question were embraced in the description of "thread laces" in the schedule; for if so, the duties upon them were fixed at thirty per cent. *ad valorem*, and they were not subject to the duty exacted of forty per cent. as a manufacture of flax, or of which flax was a component part of chief value "not otherwise provided for."

The evidence produced by plaintiffs tended to show that the terms "thread lace and insertings," as used and understood among commercial men of the country, included all laces made of thread on a cushion, with bobbins moved by hand, in distinction from laces made by machinery or with needles; that they have a special name attached to them, such as point lace, torchon lace, Smyrna lace, and the like, by which their style and kind are indicated; and that torchon laces, though a very old kind, and not imported to any considerable extent until within a few years past, were generally known as thread laces, and were such in fact.

The evidence produced by the defendant tended to show that there was a class of laces known to commerce and to dealers as thread laces, made by hand on cushions with bobbins, and more particularly designated as English, French, or German laces, which were supposed to be made of linen thread,

but which were in fact composed chiefly of a fine cotton thread, with only one large linen thread running through the pattern to mark the figures; that torchon laces were not known as "thread laces," but only by their special designation; and that torchon and Smyrna laces and some Saxony laces were all that were made of linen thread by hand on cushions with bobbins.

The court left it to the jury to determine whether the torchon lace imported by the plaintiffs was "thread lace," such as is meant and described in the statute, and instructed them that if it did not come under that general designation they should find for the defendant; that it made no difference whether the lace was known to commerce at the time the law was enacted; that if brought into use afterwards, and yet came under the general designation of "thread lace," the government must accept the duty imposed by the law upon that article.

The defendant requested a special instruction that if the jury believed from the evidence that the torchon lace did not come within the class known as thread lace, designated and intended as such by the statute when it was enacted, they should find that it was not a thread lace. This instruction the court refused to add to that already given, and an exception was taken. The jury found for the plaintiffs, and the case is brought here for review.

The record does not disclose any error. The instruction of the court was correct. The special instruction asked was substantially a repetition of that given, and, therefore, unnecessary; there was evidence upon which the jury could find its verdict, and no legal reason is shown why it should be disturbed. The judgment is therefore affirmed.

AFFIRMED.

REUBEN T. POLLARD AND STEPHEN PETTUS, PARTNERS AS POLLARD, PETTUS & CO., v. H. J. VINTON.

March 20, 1882.

1. The legal character and effect of a bill of lading stated in reference to its negotiable quality.
2. Neither the master of a vessel nor the shipping agents of steamboats on the rivers of the interior, at points where they receive and deliver cargo, have authority to bind the vessel or its owners by giving a bill of lading for goods or cargo not received for shipment.
3. Such a bill of lading, being outside of the power conferred by the agent's authority, is void in the hands of a person who may have afterwards in good faith taken it and advanced money on it.

ERROR to the Circuit Court of the United States for the District of Kentucky.

E. Ellery Anderson, for plaintiffs in error.

B. H. Bristow and *Augustus E. Wilson*, for defendants in error.

MILLER, J.—The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams & Co. at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for five thousand nine hundred dollars, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict

for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs.

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, *all* inquiry into the transaction in which it originated because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona-fide* purchasers only applies to it in a limited sense.

It is an instrument of a twofold character: it is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment.

It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first deliv-

ered cannot hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the shipowner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence:

"During the month of December, 1873," (the date of the bill of lading,) "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, *with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat Ben Franklin.*"

This authority to execute and deliver bills of lading has two limitations, namely: they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form

of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

They had no authority to *sell* cotton and contract for delivery. They had no authority to *sell* bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of Schooner Freeman *v.* Buckingham, 18 How., 182.

In that case the schooner was libelled in admiralty for failing to deliver flour for which the master had given two bills of lading certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libelants, who resided in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libelants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner, of the vessel could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel, and the court held that, having consented to this delivery of the vessel, he was bound by all the

acts by which the master could lawfully bind a vessel or its owner.

The court in further discussing the question says: "Even if the master had been appointed by the claimant, a willful fraud committed by him on third persons by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends."

And the court cites as settling the law in this way in England, the cases of Grant *v.* Norway, 2 English Law and Equity, 337; Hubbarts *v.* Ward, 18 Id., 551; and Coleman *v.* Riches, 29 Id., 324. Also Walter *v.* Bruner, 11 Mass. R., 99. See,

also, McLean *v.* Fleming, Law Reports, 2 House of Lords, 128; Maclachan's Law of Merchant Shipping, 368-9.

It seems clear that the authority of E. D. Cobb & Co. as shipping agents cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very question of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiff's counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice.

The case of the New York and New Haven Railroad Co. *v.* Schuyler, 34 N. Y. R., 65, is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *pure agency*, and depends solely on the power confided to the agent.

In the other case *the officer is the corporation* for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents, of the corporation, or of the corpor-

ators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think the case of Railroad Co. v. Schuyler presents a rule for this case.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

POLLARD AND OTHERS v. THE U. S. MAIL LINE COMPANY.

This case is identical with that of the same plaintiffs v. Vinton, just decided; the bill of exceptions being identical, except in the name of the defendant and the steamboat owned by it.

The judgment is therefore affirmed.

AFFIRMED.

MOSES TAYLOR v. THE CITY OF YPSILANTI.

March 20, 1882.

1. Under a statute which authorizes a municipality to pledge its aid to a railroad "by loan or donation, with or without conditions," a resolution of a city voting aid on condition that if any of its citizens should subscribe and pay for any stock of the railroad, the latter should deliver to such persons the bonds of the city to that amount, * * * and that its citizens should have the right to subscribe to its stock for a certain time, is a loan or donation within the meaning of the statute.
2. The Legislature of a State, in the absence of constitutional prohibition, can authorize municipalities to aid in the construction of railroads owned and managed by private persons.
3. The act of the Legislature of Michigan of March 24, 1869, authorizing certain municipalities to aid in the construction of a railroad, is not in conflict with sections 6, 8, and 9 of article 14 of the Michigan Constitution forbidding the credit of the State from being granted to private persons or corporations, and forbidding the State from subscribing to the stock of any corporation or from being interested in any work of internal improvement, and forbidding any person from being deprived of property without due process of law.

Opinion of the court.

4. It is the duty of the Federal courts in all cases within their jurisdiction depending on local law to administer that law, so far as it affects contract obligations and rights, as it was judicially expounded at the time such obligations were incurred or such rights accrued; and they do not feel bound to follow later decisions of the State courts modifying the rule previously expounded by them, in respect to contracts made on the faith of the law as first expounded.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

E. W. Meddaugh and *Geo. F. Edmunds*, for plaintiff in error.

H. J. Beakes, for defendant in error.

HARLAN, J.—This action was brought by Taylor, a citizen of New York, to recover from the city of Ypsilanti, a municipal corporation of Michigan, the amount of certain coupons of bonds issued by that city in aid of the construction of the Detroit, Hillsdale and Indiana Railroad. At the conclusion of the evidence the jury, being so instructed, returned a verdict in behalf of the city, upon which judgment was entered.

The bonds purport to have been issued under the authority of a general statute, approved March 22, 1869, declaring it to be lawful, within prescribed limits as to amount, for any city or township—a majority of its electors, voting at a meeting called for that purpose, assenting—to pledge its aid, "by loan or donation, with or without conditions," in the construction of any railroad by a corporation organized under the laws of Michigan. The electors voted aid to the extent of fifty thousand dollars in bonds of the city, upon condition that the company should have and continue the eastern terminus of its road in the city, or connect, within its limits, with the Michigan Central Railroad; and upon the further condition, that if any citizen of Ypsilanti should subscribe and pay for any share in the stock of the company, the latter "shall deliver to the persons so subscribing and paying for such share the bond or bonds of said city equal to the amount so subscribed

and paid for, not exceeding in all the amount of bonds issued by said city to said railroad company; and that citizens of said city shall have the right to subscribe to the stock of said railroad company to an amount not exceeding fifty thousand dollars for thirty days after such aid shall have been voted." Upon each bond appears a declaration, under the official signature of the mayor and clerk of the city, setting forth the conditions attached by the popular vote to the issue and delivery of the bonds.

In support of the judgment it is contended that the city, in giving aid to the construction of a railroad, was restricted to the specific modes—loan or donation—designated in the statute; that this transaction was neither a loan nor a donation; that it is essential to a donation that it should not be made for a valuable consideration, or in execution of a contract embracing reciprocal obligations, since, in a legal sense, it implies an act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without any consideration; and, consequently, the city was without power to issue bonds upon conditions such as those imposed by the electors. The conditions, it is argued, are inconsistent with any correct idea of donation, and, consequently, the bonds based thereon must be held to have been unauthorized by law, and to be invalid as obligations of the city.

In this conclusion we are unable to concur. The argument of counsel fails to give proper effect to material portions of the statute. Power was conferred not simply to make a loan or donation, but to make a loan or donation "with or without conditions." The statute is silent as to the nature of the conditions with which the loan or donation might be accompanied. It was, in our opinion, a legitimate exertion of that power to secure, in connection with a corporate donation, such advantages or special privileges for the people of the municipality, not inconsistent with public policy, as the railroad company was willing to concede. The requirement that the

company should have and continue the eastern terminus of its road in the city, or connect, within its limits, with the Michigan Central Railroad, inured to the benefit of the mass of the population interested in the growth and prosperity of the city; while the stipulation that citizens of Ypsilanti should be entitled, for a limited period, thirty days, to receive the city's bonds to an amount equal to the stock they might subscribe and pay for, (not exceeding the amount of the bonds donated,) was of value to such persons only as chose to avail themselves of the privilege thus secured. If the transaction has any element of bounty to individual citizens, and was not, for that reason, a donation within the technical meaning of that word, it is quite sufficient to say that it is within the express statutory authority to attach conditions to any donation which the people might sanction. We are, therefore, of opinion that the donation by the city of its bonds, upon the condition prescribed by popular vote, was within the terms of the statute.

This brings us to the consideration of the proposition advanced in behalf of the city, that the act of March 22, 1869, is repugnant to the Constitution of Michigan, as expounded by its highest judicial tribunal in People *v.* Salem, 20 Mich., 452; Bay City *v.* State Treasurer, 23 Id., 499, and several other cases decided, in the same court, at a subsequent period. These adjudications, it is claimed, constitute the law of this case, and should be followed, as of obligation, without reference to the time when they were made, or to any opinion we may entertain as to the soundness of the principles announced.

The specific provisions of the State Constitution which, it is supposed, establish the invalidity of the act in question, are sections 6, 8, and 9 of article 14, which declare that "the credit of the State shall not be granted to, or in aid of, any person, association, or corporation," (sec. 6;) that "the State shall not subscribe to, or be interested in, the stock of any company, association, or corporation," (sec. 8;) and that "the State shall not be a party to, or be interested in, any work of internal improvement, nor engaged in carrying on any such work except

in the expenditure of grants to the State of land or other property," (sec. 9;) and section 32 of article 6, which declares that "no person shall be * * * * deprived of life, liberty, or property without due process of law." These sections constitute a part of the Constitution of 1850, which is still the fundamental law of the State.

It is not to be questioned that the Supreme Court of Michigan, in the cases cited, has ruled that it was beyond the constitutional power of the Legislature to grant to a municipal corporation authority to pledge its credit or issue bonds in aid of the construction of railroads by corporations organized, owned, and managed by private persons. Before examining the particular grounds upon which those decisions rest, it is necessary that we should ascertain what was, at the date of the passage of the act of March 22, 1869, the law of Michigan declared and acted upon by the several departments of its government, upon the general subject of the relations between railroad corporations and the public. The earliest case to which our attention has been called is Swan *v.* Williams, 2 Mich., 427, determined in 1852. The question there was as to the constitutional validity of an act incorporating a railroad company, in so far as it authorized the appropriation of private property for the location, construction, and operation of the road authorized by its charter. Its validity was assailed chiefly upon the ground that property so appropriated is taken for the private profit and advantage of the corporators, in no sense for public purposes. But the State court declined to accede to that view. It held that counties, towns, cities, and villages are political or municipal corporations which, from their nature, are subject to the unlimited control of the Legislature; that corporations, such as banking, insurance, manufacturing, and trading companies, were private corporations, the private advantage of the corporators being the ultimate as well as the immediate object of their creation, and the resulting benefits to the public being merely incidental; and that turnpike, bridge, canal, and railroad companies are more properly styled public cor-

porations, since in their creation public duties and public interests are involved, the discharge of those duties and the attainment of those interests being the primary object to be worked out through the powers delegated to them. The very existence of the latter, said the court, was based as well upon the delegation to them of the sovereign power to take private property for public use, as upon the continued exercise of that power in the use of property for the purposes for which it was condemned; that such corporations are the means employed to carry into execution a given power; that the character of a corporation is determined not so much by the object sought by it, as by that designed by the Legislature; that if that object be the public interest, to be secured by the exercise of powers, delegated for that purpose, which would otherwise repose in the State, the corporation is public, although private interests may be incidentally promoted; that such a corporation is essentially "the trustee of the government for the promotion of the objects desired, a mere agent to which authority is delegated to work out the public interest through the means provided for that purpose, and broadly distinguished from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally, and not necessarily, from its operations." That there might be no doubt as to the scope of the decision, Mr. Justice Martin, speaking for the whole court, further said:

"Nor can it be said that the property when taken is not used by the public, but by the corporators for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators, but it is nevertheless true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the services. If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private me-

dium, or by delegated authority; yet all past history tells us that governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. * * * The purpose designed by the government in the construction of these roads is the *use* of the public, the expeditious communication from point to point, and not revenue."

In 1859 the Legislature of Michigan passed an act providing for the payment from the State treasury of a certain sum, by way of bounty, for every bushel of salt manufactured by any individual, company, or corporation from water obtained by boring in Michigan, and exempting from taxation property used for such purposes. (Laws of Mich. 1859, p. 551.) That law was subsequently amended, and in People *v.* State Auditors, 9 Mich., 327, decided in 1861, it was held that the relators, a manufacturing company, acquired a vested right to the amount offered by the original act for all salt manufactured prior to the amendatory statute reducing the bounty. And the doctrines of that case were reaffirmed in East Saginaw Manufacturing Company *v.* City of East Saginaw, &c., 19 Mich., 274, decided in 1869, after the passage of the act of March 22, 1869.

The diligence of counsel, aided by our own researches, has not disclosed any adjudication of the Supreme Court of Michigan, prior to May 26, 1870, in which the doctrines of these cases were recalled, or in any degree modified—doctrines constituting, as will not be denied, the foundation upon which, in the courts of this country, rests the power of the Legislature, when unrestrained by constitutional inhibitions, to authorize municipal aid to railroad enterprises.

So far as the action of the legislative and executive departments of Michigan are concerned, we find that from the adoption of the Constitution of 1850 down to the passage of the act in question, authority was given, in many instances, to

municipal corporations to aid in the construction of railroads and plank roads by corporations organized and managed by private persons. And by a general statute passed in 1855, providing for the incorporation of railroad companies, authority was given to condemn real estate, property, and franchises for the purposes of the corporation, making compensation therefor in the mode prescribed. That statute expressly declares that "all real estate, or property whatsoever, acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use." (Compiled Laws of Mich. 1857, vol. 1, pp. 638, 643.) It was in force when the act of March 22, 1869, was passed. . . But this is not all. In the year 1867 a convention was held, charged with the duty of revising the Constitution of the State. The delegates in that body were of course aware of the existence of numerous statutes, public and private, authorizing railroad corporations to condemn private property for the purpose of constructing and maintaining railroads, and empowering municipal corporations of the State to pledge their credit in aid of their construction. If such legislation was in opposition to the will of the people, or if it was deemed to be . . forbidden by the letter or spirit of the existing Constitution, to remodel and revise which was the object of the convention, we should expect to find in the new Constitution some distinct provision reversing the policy which had been steadily pursued by the legislative and executive departments of the State, and which had been sustained as constitutional by the judiciary. But no such provision was adopted. On the contrary, two sections were adopted, relating to the subject of municipal aid to railroads, one declaring that "the Legislature shall not authorize any city or township to pledge its credit, for the purpose of aiding in the construction of any railroad, to such an extent that the outstanding indebtedness, exclusive of interest, on account of aid to any and all railroads, shall exceed ten per cent. of the assessed valuation of such city or township;" while the other affirmatively declared that the Legisla-

ture might authorize any city or township to raise money by taxation, for such purposes, within the amount named. Although the Constitution submitted by the convention of 1867 was not adopted by the people, the sections to which we have referred, adopted by delegates representing every portion of the State, show that there was no purpose to take from the Legislature the power, under all circumstances, of authorizing municipal aid to railroad corporations. The effect was only to restrict the power heretofore exercised by the Legislature.

The act of March 22, 1869, contains no clause of an unusual character. It is general in its application to all the townships, villages, and cities of the State. It requires all bonds executed under its provisions to be delivered to the State treasurer, to be by him held, as trustee for the municipality and the railroad company, until all the conditions prescribed by popular vote or by the statute were performed. It declares that the railroad company for which the bonds were voted should be entitled to receive them whenever the governor certified that all conditions had been performed. The bonds having been deposited with the State treasurer, the company entered upon the work of construction in the winter of 1869–'70. The road was completed prior to January 1, 1871, and has been in operation ever since. But prior to May 26, 1870, it had been so far constructed that the railroad company became entitled under its contract to the bonds voted by the city of Ypsilanti. And on the 10th June, 1870, the governor gave his certificate, under the State seal, stating that the company had performed all conditions prescribed by the statute and the vote of the people, and was entitled to receive the bonds voted by the city. Subsequently, on the 21st June, 1870, the treasurer delivered them to the company, indorsing upon each that it was delivered by him, on that day, under the provisions of the act of March 22, 1869. Thus the city and the railroad company received all for which they respectively bargained.

On the 26th day of May, 1870, (after, let it be observed, the railroad company had earned the bonds under its contract

with the city, and was entitled to the required certificate from the governor,) the case of People *v.* Salem was determined in the Supreme Court of the State. It involved the constitutional validity of an act, passed in 1864, authorizing certain townships to pledge their credit, and the county of Livingston to raise by tax a loan of money, in aid of the construction of a railroad. The court, Mr. Justice Graves dissenting, held the act to be unconstitutional. The point was distinctly made in argument that municipal aid to railroads was prohibited by sections 6, 8, and 9 of article 14 of the State Constitution It was claimed that those sections would be rendered nugatory if so construed as to recognize the power of the Legislature to authorize or compel each city and township in the State to grant or loan its credit to, or subscribe to the stock of, railroad or other companies, to the amount of a fixed or uniform percentage of the assessed valuation of their taxable property. But the court declined, at least it failed, to rest its decision upon any specific provision of the State Constitution. Its conclusion was placed upon what was declared to be fundamental maxims of all taxation. It held the exercise, by a municipal corporation, of the power to pledge its credit, to be an incipient step in the exercise of taxation; that it is essential to a valid exercise of the power of taxation that it be for a public purpose; that a corporation created for the purpose of constructing a railway, to be owned and operated by the corporators, is a private corporation; that taxation for such a purpose is no more for a public purpose than would be taxation in behalf of the proprietors of a mill, or hotel, or newspaper establishment, or other similar enterprise, which, while private in its nature, supplied a public need. The conclusion of the court was distinctly placed upon general principles, and not upon grounds of local law or upon any special provision of the State Constitution, as is manifest from the last paragraph in the leading opinion, in these words: "As, therefore, it appears that the first and most fundamental maxim of taxation is violated by the act in question, it becomes superfluous

to consider whether the act would also violate the maxim of apportionment, or be obnoxious in its application, because the burden, even if public, could not also be regarded as local and peculiar to this township. Equally superfluous is it to consider in detail the several express provisions of the State Constitution which the respondents suppose to be violated. If the authority exercised is not within the taxing power of the State, it is quite needless to discuss whether, if it were within it, there are not restrictions which prohibit its exercise." The conclusion in that case, as thereafter declared in Bay City *v.* State Treasurer, struck at the root of all legislation in aid of railroad companies.

We remark in passing that the doctrines of People *v.* Salem were, when announced, in direct conflict with those previously promulgated, as well by this court as by the highest courts of a large majority of the States. It was said by Mr. Justice Clifford, speaking for the court, in Rogers *v.* Burlington, 3 Wall., 663, decided in 1865, that the rule that the Legislature, in the absence of constitutional prohibitions, could authorize municipalities to aid in the construction of railways, owned and managed by private corporations, pervaded the jurisprudence of the United States. We will not at this late day enter upon the vindication of that rule. And we may add that under the later doctrines announced by the Supreme Court of Michigan it is difficult to perceive how railroads can be regarded as public highways, subject, in the interest of the public, to governmental control and regulation.

Subsequently, in Bay City *v.* State Treasurer, the Supreme Court of Michigan reaffirmed the doctrines of People *v.* Salem. In that case, however, the invalidity of municipal aid and taxation for the construction of railroads by railroad corporations was apparently placed upon these additional grounds: 1. That such taxation being inadmissible under the fundamental principles announced in People *v.* Salem, was to be deemed unlawful confiscation, and therefore inhibited by section 32 of article 6 of the State Constitution, protecting all persons against

deprivation of property without due process of law; 2. That taxation for such purposes was in violation of sections 6, 8, and 9 of article 14 of the State Constitution. It is unnecessary to notice the declarations of the State court in subsequent cases, since they are in line with those made in the two to which we have referred.

In January, 1872, the case of Talcott *v.* The Township of Pine Grove was determined in favor of the plaintiff in the Circuit Court of the United States for the Western District of Michigan. The question there was as to the constitutional validity of the identical act of March 22, 1869, under the authority of which the bonds in suit were issued. That court, the circuit and district judges concurring, declined to follow the case of People *v.* Salem, upon the ground, among others, that the act of March 22, 1869, was valid as well under the laws of Michigan, declared and acted upon by all the departments of the State government at the time of its passage, as under the principles announced in this court and in the highest courts of most of the States. Upon writ of error the judgment in Talcott *v.* Pine Grove was affirmed in this court at its October Term, 1873. (19 Wall., 666.) In the argument of that case in this court attention was called to the decisions in People *v.* Salem and Bay City *v.* State Treasurer, and it was earnestly contended to be the duty of the courts of the Union to accept the declarations of the State court as to the want of power in municipal corporations of Michigan to pledge their credit or aid in the construction of railroads by corporations owned and managed by private persons. After adverting to the principle that a statute was not to be pronounced void unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable, this court, speaking by Mr. Justice Swayne, affirmed the judgment, holding the act of March 22, 1869, to be consistent with the Constitution of Michigan. (Railroad Co. *v.* County of Otoe, 16 Wall., 667; Olcott *v.* Supervisors, Id, 678.) Under the circumstances it was said that we could not yield to the authority of the decisions of the State court with-

out abdicating the performance of one of the most important duties with which this tribunal is charged.

Of the bonds here in suit, Taylor became the purchaser, for a valuable consideration, in the year 1877. He was aware, at the time of his purchase, of the before-mentioned decisions of the Supreme Court of Michigan, adjudging municipal aid to railroad corporations to be forbidden by law and bonds issued therefor to be invalid. But, it is to be presumed, he was also aware that this court, affirming the judgment of the Circuit Court of the United States sitting in that State, had, at a subsequent period, and long before his purchase, distinctly refused to follow the later decisions of the State court, and had adjudged the act of March 22, 1869, to be in conformity with the fundamental law of Michigan. The present case, then, appears to be this: Testing the rights and obligations of the parties by the law of the State as declared by this court, and as declared and acted upon by all the departments of the State government, at and before the time when the railroad company entered upon the execution of its contract with the city, we should be obliged to reverse the judgment of the court below; whereas if we accept the decision of the Supreme Court of Michigan, made after those rights accrued and after the railroad company had earned the bonds, as conclusive evidence of the constitutional invalidity of the act of March 22, 1869, the judgment must be affirmed.

The position taken by counsel for the city is that the established, settled construction, given by the highest court of a State, of the laws and Constitution of that State, must be deemed, in all cases, binding upon the courts of the Union; this, because the statute defining and regulating the jurisdiction of the Federal courts declares that the laws of the several States, when they apply, shall constitute rules of decision in cases at common law tried in those courts. This proposition, in the general terms in which it is announced, is undoubtedly supported by the language of some of the opinions which have emanated from this court. But all along through the reports

of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the Federal courts, in all cases, within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws. The sound and true rule, said Chief Justice Taney, in Ohio Life Insurance Co. *v.* Debolt, 15 How., 432, is that if the contract when made is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State, or decision of its courts, altering the construction of the law. So in City *v.* Lamson, 9 Wall., 485, Mr. Justice Nelson, speaking for the court, said: "It is urged, also, that the Supreme Court of Wisconsin has held that the act of the Legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued the decisions of the courts of the State favored the validity of the law. The last decision cannot, therefore, be followed."

Again, in Olcott *v.* Supervisors, 16 Wall., 690, the court, speaking through Mr. Justice Strong, said: "This court has always ruled that if a contract when made was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature, or the judiciary, will be regarded by this court as establishing its invalidity." To the like effect are some very recent decisions of this court. In Douglas *v.* County of Pike, 99 U. S., 687,

upon a review of some of the previous cases, the court, speaking by the present chief justice, said that "the true rule is to give a change of judicial construction in respect of a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. * * * So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

For these reasons, and without reference to any other questions discussed, we are of opinion that the rights of the plaintiff, as the owner of bonds issued under a statute which, when passed, was valid by the laws of Michigan, as declared and acted upon by departments of its government, are not affected by decisions of the Supreme Court of the State rendered after the railroad company, to whose rights plaintiff succeeded, had earned the bonds under contract with the city made in conformity with the statute. Under the case as presented the jury should have been instructed to find for the plaintiff rather than for the defendant.

The judgment is reversed, with directions to set aside the judgment and verdict, and for such further proceedings as may be consistent with this opinion.

REVERSED.

Statement of the case.

GIDEON BANTZ v. DAVID FRANTZ ET AL.

March 20, 1882.

1. The patent granted June 22, 1858, to Gideon Bantz construed to be for a combination of several devices, and his reissue granted February 6, 1872, construed to claim each device separately, and hence to be void as being too broad.
2. But, even if valid, the laches of waiting for nearly fourteen years before applying for a reissue is fatal to it.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

On June 22, 1858, there was issued to Gideon Bantz, the appellant, who was complainant in the court below, an original patent of that date "for an improvement in furnaces for heating steam boilers." On February 6, 1872, Bantz obtained a reissue, and on June 22, 1872, an extension for seven years of his reissued patent.

The bill in this case was filed by him on May 4, 1876, to restrain infringement by the defendant, David Frantz, of the extended reissue.

The answer denied the novelty and utility of the invention, denied infringement, and asserted the invalidity of the reissue.

The Circuit Court dismissed the bill, and the case is brought here by the appeal of the complainant.

The specification of the original patent declared:

"The object of this invention is the more perfect combustion of tan, sawdust, bagasse, and all other kinds of refuse fuel in a wet or dry state, as well as of wood or coal. It is, however, with particular advantage to the burning of wet fuels. My invention consists in the arrangement embracing, for united use in the manner and for the purposes hereinafter specified, the following features, to wit:

"First, two or more arched fire-chambers, with throats of less area than their capacity; second, an auxiliary combustion reservoir or chamber, with *cima-reversa* shaped bottom and side draft-door; third, a series of reverberatory-chambers, with side

draft-doors and passages at the top for communication with each other; and fourth, a diving or direct flue leading into the chimney or smoke-stack.

"To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

"A A are two arched fire-chambers, arranged side by side, furnished with grates *a a*, having ash-pit B B provided below the said grates. These fire-chambers are not placed below the boiler, H, but directly in front thereof, and longitudinally parallel therewith. They may, however, be placed at one side of the boiler, or at any angle to it. Each is provided with the usual door *b*, but these are only used for lighting the fires; and the ash-pits are provided with doors *c* to regulate the supply of air through the grates, and permit the cleaning out of ashes. On the top of each chamber there are feeders *d d* for supplying the fuel, but as these feeders are the same as used in other furnaces, no particular description of them is necessary. The fire-chambers are covered with a flat floor built over the arches, that the fuel may be wheeled to the feeders in barrows, or brought in any other convenient manner. At the rear end of each fire-chamber there is a throat-like aperture *e* communicating with what I term the reservoir C, which is built of brick, lined with fire-brick, under the front portion of the boiler, and which has a concave bottom *m* and convex back *n*, which are formed by a *cima-reversa* shaped plate. By having the bottom and back of the reservoir formed by a *cima-reversa* shaped plate, the throat *e* is not partially closed up, as it would be if the plate was straight and set inclined, and, besides this, the heated products of combustion are made to hug the bottom of the boiler, and as the draft is at this point, the perfect combustion of partially ignited gases is insured. The convex back of the reservoir terminates in and serves as a bridge-wall, and has a concave top so formed as to leave a space, *o*, of but three or four inches between it and the boiler.

Statement of the case.

"The purpose of the reservoir will be presently explained. In rear of the bridge-wall *f* there is a series of reverberatory-chambers D D D, two, three, or more, one behind the other, the series extending nearly as far as the rear end of the boiler, and the said chambers being severally separated by bridge-walls, *g g*, and each chamber being provided with one or more doors *h*, in either or both sides, for the purpose of admitting air in sufficient quantities either to complete the combustion of the gases from the fire-chambers or to check the draft. The reservoir is furnished with a door h^1, for a similar purpose as those *h h* in the reverberatory-chamber. At the rear of the hindmost reverberatory-chamber there is a wall g^1, like *g g*, behind which there is a diving or drop flue E leading to the chimney.

"The operation of the furnace is as follows: The gaseous products of the combustion in the fire-chamber A A escape by the throats *e e* into the reservoir C, where they mingle together, and the combustible portion thereof becomes ignited, and where their heat acts upon the boiler, and from whence they pass into one after another of the reverberatory chambers, in each of which a portion of their heat is abstracted by contact with a portion of the boiler, and finally they descend the flue E to the chimney. The effect of the principal portion of my improvement, which consists in the employment of the reservoir C, connected with the fire-chambers by the throats *e e*, of much smaller transverse area than the fire-chamber, is that the products of combustion and heat are prevented leaving the fire-chamber too rapidly, and the said chambers are consequently caused to be heated to an intense degree, and a very nearly perfect combustion of the fuel is obtained therein, and when the gaseous products of combustion leave the fire-chambers by the said throats, and arrive in the reservoir C, the side wall and curved bottom and back of which are kept at a white heat, the still combustible portion of the gaseous products is ignited under the boiler."

The claim was thus stated: "What I claim as my invention, and desire to secure by letters patent is: the arrangement

of fire-chambers A A, contracted throats *e e*, auxiliary combustion-reservoir C, with the *cima-reversa* bridge-plate *m n*, and the door *h'*, reverberatory-chambers D D, with doors *h h*, and and the diving or direct flue E, substantially as and for the purposes set forth."

The description of the invention in the specification of the reissued patent is substantially the same as that in the specification of the original patent. The drawings are identical. In the reissue the invention is called "a new and useful improvement in furnaces for burning wet fuel." The claim is thus set forth:

"I do not claim a furnace for burning wet fuel, broadly, nor the use of a series of fire-chambers connecting with the common flue, arranged between the furnace and the boiler, as I am well aware that this has been done before.

"Having described my invention, I claim—

"1. In a furnace for burning wet fuels, having two or more single fire-chambers not arranged under the boiler, the combustion-chambers or reservoir C, arranged above the top of said fire-chambers, and located directly under the front end of the boiler, essentially as described.

"2. The *cima-reversa* bottom *m n* of the combustion-chamber or reservoir C, in combination with the narrow throats *e* of the seperate fire-chambers, and the narrow exit flue *o* of the bridge-walls *f*, for the purpose essentially as described.

"3. In combination with the combustion-chamber or reservoir C. arranged and located as described, I claim the side doors *h'*, for the admission of atmospheric air, for the purpose described.

"4. In combination with a series of fire-chambers A, and the combustion-chamber or reservoir C, located and arranged directly beneath the front end of the boiler, and above the crown of said fire-chamber, I claim a series of reverberatory-chambers D, provided with side doors *h*, and a diving-flue, E, at the rear end of the boiler, to hold the heat beneath the same

throughout its entire length, and to arrest and deaden the sparks as described.

"5. In a furnace for burning wet fuels in which the fire-chambers are not arranged under the boiler, I claim the arrangement of the boiler upon the rear wall of the furnace and the rear wall of the diving flue E, for the purpose of obtaining the full advantage of the heat of the walls of the furnace and of the diving flue as described.

"6. In a furnace for burning wet fuels, having a flat top, and supplied through openings therein, I claim the dead-chambers, arranged between the floor and the arches of the fire-chambers, for the purpose of maintaining the top of the furnace cool for the workingmen, as described."

Arthur Stern, for appellant.

Lewis N. Dembitz and *William A. Maury*, for appellees.

WOODS, J.—We are clearly of opinion that the reissued patent is void.

It is evident on a cursory reading of the specification and claim of the original patent, that it was meant to cover a combination of the several contrivances therein described, and not to cover the several parts of the former as distinct inventions. No claim is made for the several parts of which the former is constructed, but for the "arrangement embracing, for united use in the manner and for the purposes specified, the following features," &c.

If the claim of the original patent had been for the several distinct contrivances of which the furnace is composed, as claimed in the reissued patent, it would not have been granted, because the evidence in the record shows that at least the sixth claim in the reissued patent, for dead-chambers over the arches of the fire-chambers, was distinctly covered by the patent of Moses Thompson, dated April 10, 1855, for an improvement in burning tan-bark, bagasse, sawdust, or other kind of fuel in a wet state, for the purpose of creating heat to generate steam,

&c. This the drawings accompanying the specifications of Thompson's patent clearly show.

It is evident, therefore, that if the appellant had, in his application for the original patent, claimed as his own invention all the distinct devices described in the specification, he could not have obtained his patent in its present form. It could have been only on the ground that his claim was for a combination that it was allowed and the patent issued.

If the reissued patent is valid, the appellant could maintain an action against any person who infringed any one of the separate claims covered by it. Under the original patent, suit could be maintained only against those who employed the combination embracing all the distinct contrivances described in the reissued patent. The reissue is, therefore, broader than the original patent, and is, under the circumstances of this case, void.

The act of July 8, 1870, (16 Stat., 205,) was in force when the reissue was granted. That act (section 53, Rev. Stat., sec. 4916) declared that "whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee."

In this case the original patent bore date June 22, 1858. The reissue bore date February 6, 1872, more than thirteen years and six months after the date of the original patent, and less than five months before its expiration. If the specification in the original patent was defective or insufficient in claiming a combination of several devices, instead of making a distinct claim for every device which entered into the combination, the fact was instantly discernible, even to an unpracticed eye, as

soon as the patent was read. Therefore, as said by Mr. Justice Bradley in delivering the opinion of this court in a similar case, Miller *v.* The Bridgeport Brass Company, decided at the present term, if any correction was desired it should have been applied for immediately; the right to have the correction made was abandoned and lost by unreasonable delay. The case referred to is apposite, and is conclusive of this.

Judgment affirmed. AFFIRMED.

SAMUEL R. C. MATTHEWS AND OTHERS v. THE BOSTON MACHINE COMPANY AND OTHERS.

March, 27 1882.

1. An original patent claimed for a combination between a hydrant and a casing or jacket around it, but not attached to it, and resting on a flange projecting from the induction pipe, the purpose being to prevent the action of frost on the hydrant; and the reissue claimed these elements separately and not as a combination: *Held:* That the reissued patent was void, as enlarging the scope of the original, and also as being for a substantially different invention.
2. The patent to Race and Matthews, dated November 16, 1869, claiming for an improvement in hydrants, which merely covered a jacket slipping over it like a sleeve and having room to play to protect it from cold, *held* void as being too general, and covering things in use before the date of the patent.
3. The defendant held, on the facts, not to have infringed the valve apparatus covered by the same patent.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

George Harding and *George L. Roberts*, for appellants.

Causten Browne, for appellee.

BRADLEY, J.—This case comes before us on appeal from a decree of the Circuit Court for the District of Massachusetts, dismissing a bill in equity filed by the appellants, in which they

prayed for an injunction and account of profits for an alleged infringement of two certain patents granted to Washburn Race and S. R. C. Matthews, one dated April 30, 1872, (being a reissue of a patent granted January 26, 1858,) and the other dated November 16, 1869. The defendants, in answer, denied that Race and Matthews were the first inventors of the thing patented, referring to several prior patents, and naming prior instances of knowledge and use of the alleged invention; and amongst other things setting up a patent issued to one Zebulon E. Coffin, dated July 21, 1868. They also denied that the reissued patent was for the same invention as the original; and denied infringement. The complainants filed a supplemental bill, alleging that since the filing of the original the defendants had procured a reissue of Coffin's patent, which contained substantially the same invention as that described in the plaintiff's patent of 1869, but that Race and Matthews were the first and original inventors of the one thing patented, and therefore they prayed that the Coffin patent might be declared void.

The Race and Matthews patents, on which this suit was brought, relate to casings or jackets around the hydrants, and to the valves for letting on the water when wanted for use, and for draining it out of the hydrant when not in use. It is conceded that the objects of the casing are, to prevent freezing in and around the hydrant by surrounding it with a volume of dead air, to keep it free from contact with the surrounding earth, and to enable the hydrant to be taken out of the ground without removing the surrounding earth. If the earth is in contact with the hydrant, it lifts the hydrant out of place by the action of the frost, and has to be dug away when repairs or other operations have to be performed below the surface. Many casings formerly used were fastened in different ways to the hydrant, and when lifted by the frost raised the latter also, causing breakage or leakage or other damage by the displacement; and, also, the hydrant could not be disconnected from the main and removed without removing the casing also.

Opinion of the court.

So far as the improvement in the casing is concerned, the principal thing claimed to be effected by the patentees, Race and Matthews, is the placing of the case in position without attaching it to the hydrant, or to the elbow of the main pipe below, so that the hydrant, whilst being protected from frost and the surrounding earth, may be lifted out separately, and so that the lifting of the case by the frost and surrounding earth will not disturb the hydrant. These objects are effected by two different devices; first, by causing the case to rest loosely on a flange projecting from the elbow of the main, or otherwise, and allowing it to slide up the hydrant which it surrounds, and which is enlarged at that point, for holding the valves; secondly, by allowing the upper end of the case to embrace the hydrant, (enlarged at that point also,) and to slide up and down upon it like a sleeve. Of course, the case must fit the hydrant snugly enough to keep out the influx of cold air above and of dirt below; but not so tight as to prevent the hydrant from being lifted out, or the case from slipping up and down upon it. This is the thing which the complainants contend that Race and Matthews invented.

As first patented in 1858, the invention did not accomplish the object. The bottom of the case, it is true, surrounded the hydrant like a sleeve, and rested on a flange projecting from the elbow, (which allowed the hydrant to be separately removed without removing the case,) but the top of the case was enclosed in a flange projecting from the enlarged part of the hydrant above, like the brim of a hat, but turned down over the top of the case, so that the latter, though unconnected otherwise with the hydrant, yet, if it were lifted by the frost, it would press upward against the flange and raise the hydrant also. This difficulty was remedied by the invention of the improvement patented in 1869, by which the top of the case was made to surround and enclose the upper enlargement of the hydrant, and to slide over it like a sleeve as before stated. The reissued patent of 1872 substantially embraces both features of the improved case,—namely, its disconnection with the

hydrant both above and below, and places much stress on the dead-air chamber as a protection from frost, and on the protection of the hydrant below from the surrounding earth, although no claim is based on these last features.

The defendants contend that this reissued patent is not for the same invention as that which is described and patented in and by the original patent of 1858; that the latter made no mention of the dead-air chamber formed by the casing, as a protection of the hydrant from the frost; and that it contained no indication that the case should fit closely to the hydrant so as to prevent the passage of cold air into the chamber from without. But to these objections it is answered, that the case invented by Race and Matthews in 1858, was a machine or apparatus having, or being susceptible of, various functions, some of which were well known and needed not to be mentioned or described. Amongst these known functions of the hydrant casing were the formation of a dead-air chamber to prevent freezing, and the protection of the hydrant from contact with the surrounding earth. The patent of Coffin, on which the defendants rely, states that prior to the date of his invention *frost jackets*, or cases, on hydrants were well known; that they surround the hydrant proper, an air space existing between the two. It was not necessary for the patentees, Race and Matthews, to enumerate all the known functions of these frost jackets in their original patent; and, as no claim was based upon them, it could not be hurtful to enumerate them in the reissued patent.

But the complainants in their reissued patent have split up and divided the elements of their invention, and claimed them separately, and not as a combination. Of course this enlarges the scope of their patent. The separate claims embrace fewer elements in combination than were embraced in the claim of the original patent. No one could infringe the original patent unless he used all the elements of the combination. Any one will infringe the reissue who uses any of those elements which are now separately claimed.

The original patent had but a single claim in reference to the case, being a claim for a combination between the hydrant, the induction pipe provided with a flange to sustain the jacket, and the jacket itself, when arranged as described in the specification to effect the desired end, to wit, the ready removal of the hydrant. This, in the reissued patent, is divided into two claims, namely, first, the jacket surrounding the hydrant, and forming a separate and removable part from the elbow substantially as and for the purpose set forth; secondly, the independent jacket supported on the arm or elbow of the main at or near the junction of the hydrant, substantially as shown and described. That is to say, there is a claim of a jacket separate and removable from the elbow, and of a jacket resting on the elbow. It cannot be denied that each of these separate claims is much broader than the claim in the original patent; and they are put forth in the reissue fourteen years after the original was granted. The latter showed on its face that these broad claims were not made; and if the patentees were really the inventors of an independent jacket standing loosely on the elbow of the main, when apprised that it was not claimed in the patent they ought to have used due diligence in surrendering it, and having the mistake corrected. The case clearly comes within the ruling lately made in Miller *v.* The Bridgeport Brass Company.

There is still another objection to the claims in question. There is a wide departure from the original invention in this: that the subject of the latter was a jacket, or casing, whose top was enclosed in and covered by a flange projecting from the hydrant, which effectually prevented the removal of the jacket with removing the hydrant also; and which caused the hydrant to be raised when the jacket was lifted by the frost. In the reissued patent nothing is said of this arrangement of the top of the jacket, and the claims ignore it altogether; so that, as already intimated, the patent, as it now stands, would cover such a jacket as that described and claimed in the complainants' patent of 1869, which slides like a sleeve over the hy-

drant at top as well as bottom. The reissue is not only for a broader claim made many years after the original was granted, but is for a different invention. Therefore, so far as the jacket is concerned, we think it cannot be sustained.

But the patent of 1869 still remains. That was for an improvement by which it was proposed to liberate the top of the case from the flange which covered and inclosed it, and make it surround the hydrant and slip over it like a sleeve. The claim is for "the detached case B, so combined and arranged with the hydrant A as to have an end play, or vertical motion, of several inches to compensate for the heaving by frost, the upper part of same passing outside of main stock of hydrant." Had this patent been confined to a hydrant jacket closed at the bottom, and resting on a flange of the main elbow, perhaps it might have been sustainable. But it is not so confined. It is only said that the lower end *preferably* shuts into a flange of the elbow. The specification, it is true, commences with a statement that the invention was a mere improvement upon that described by the patent of 1858, which was for a case closed at the bottom by standing on a flange; but before getting through, there is an evident departure from that, and an indication that the patentees had begun to entertain views of an expanded construction intended to be placed on the original patent, which afterwards found expression in the reissue of 1872. The claim of the patent of 1869, as it stands, covers any and every loose jacket having an end-play to compensate for the heaving of the frost, and having the upper end passing around the hydrant. It covers the old New York wooden case, or housing, which was in public use for many years before Race and Matthews gave their attention to the subject. We are of opinion, therefore, that this patent cannot be sustained.

As to the valve apparatus, the object of which is to let the water in the body of the hydrant escape when the main valve is closed, and to prevent any escape of water when the main valve is open, since Race and Matthews were not the original

inventors of this process, but only of a particular arrangement of valves to effect it, they can only properly claim the specific arrangement which they invented. And in view of the older valve in the St. Louis hydrants, which that of the defendants most nearly resembles, and of the fact that the valve used by the defendants is not in the specific form of that invented by Race and Matthews, we think that the defendants are correct in their position that they do not infringe the patent of Race and Matthews, as that patent must be construed in order to be sustained.

The decree of the Circuit Court must be affirmed.

AFFIRMED.

THE TOWNSHIP OF NEW BUFFALO v. THE CAMBRIA IRON COMPANY.

March 27, 1882.

1. Taylor *v.* Ypsilanti, *ante*, p. 326, followed.
2. A purchaser from a *bona-fide* holder of negotiable paper succeeds to his rights.
3. There is no substantial distinction between a donation by a municipal corporation to a public improvement to aid its construction and a subscription to its stock for the same purpose.
4. Bonds voted to one company are not invalidated by being delivered to a consolidated company into which the first company had been merged, and which under a State statute succeeded to all the rights and privileges of the first company.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

The judgment below was for the amount due on certain bonds, with interest coupons attached, issued by the defendant in error under the authority of a general statute of Michigan, approved March 22, 1869, conferring power upon townships, cities, and villages to pledge their aid, by loan or donation, with or without conditions, to any railroad company organized under the laws of that State, in the construction of its road. (Sess. Laws Mich., 1869, p. 89.) It is the same statute

whose validity and construction was involved in Taylor v. Ypsilanti, recently determined in this court. The bonds were voted on the 22d day of May, 1869, as a donation in favor of the Chicago and Michigan Lake Shore Railroad Company, a corporation of Michigan, whose road-line commenced at the north line of the State of Indiana, in Allen county, running northwardly to the St. Joseph River, in the village of St. Joseph, Michigan, a distance of thirty miles, passing through the township of New Buffalo. When the bonds were voted there was in force a general statute under which any railroad company of the State forming a continuous or connected line with any other railroad company in or out of the State could consolidate with the latter. The statute provided that such new corporation "shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization." Further: "All and singular the rights and franchises of each of said corporations, * * * * and all and singular their rights and interests in and to every species of property and things in action shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer." (Compiled Laws of Mich., 1857, sections 1994, 1995, p. 653.)

On the 3d July, 1869, the Lake Shore Railroad Company of Western Michigan was organized, with authority to construct a road from the northern terminus of the before-mentioned road at St. Joseph River northerly to the mouth of the Muskegon River, a distance of ninety miles. By articles of agreement between the two companies, made on 12th and 13th of July, 1869, and filed in the office of the secretary of state on the 19th day of July, 1869, the two companies became consolidated into a new corporation, under the name of the Chicago and Michigan Lake Shore Railroad Company.

On the day last named the bonds, having been executed on the 1st day of June, 1869, were deposited in the office of the

treasurer of State, who was required by the statute to "hold the same as trustee of the municipality issuing the same, and for the railroad company for which they were issued." The road was finished from New Buffalo to the village of St. Joseph as early as February 1st, 1870, and has been in operation ever since. On the 4th day of February, 1870, the governor of the State made his certificate, stating that the railroad company had constructed the road in compliance as well with the statute as with the conditions upon which aid had been voted by the people, and was consequently entitled to receive the bonds from the State treasurer. They were thereupon delivered to the consolidated company, who held them until November 4, 1874, when such of them as are here in suit were transferred to the defendant in error in payment of antecedent debts due to it by the railroad company. Upon such transfer, the company's acceptances theretofore given for its debts were surrendered and the debts discharged.

H. F. Severens, for plaintiff in error.

M. J. Smiley, for defendant in error.

HARLAN, J.—1. On behalf of the plaintiff in error it is contended that, by the settled law of Michigan, as it existed when the bonds were issued, they were void. In support of that position we are referred to People *v.* Salem, 20 Mich., 452, decided May 26, 1870; Bay State *v.* State Treasurer, 23 Id., 499; and Thomas *v.* City of Port Huron, 27 Id., 320. This question was fully considered in Taylor *v.* City of Ypsilanti, where we ruled that by the law of Michigan, as expounded by its Supreme Court, and acted upon by its Legislature and executive departments, prior to the decision in People *v.* Salem, bonds issued in conformity with the act of March 22, 1869, were valid obligations of the municipality by whom they were issued. For the reasons there stated the present objection cannot be sustained.

2. Equally untenable is the proposition that the rights and

obligations of the parties are to be determined by the law as expounded by the Supreme Court of the State, at the time the defendant in error in fact received the bonds. The defendant in error is a holder for value. (Railroad Co. *v.* National Bank, 102 U. S., 14.) But if not, it is still entitled to whatever rights the railroad company had by virtue of its contract with the township. That contract was made and fully performed before the decision in People *v.* Salem was rendered, and, as already indicated, was not affected by the decision in that case.

3. Nor is it a material circumstance that this was a donation, and not a subscription of stock. In Railroad Co. *v.* County of Otoe, 16 Wall., 674, it was held that, in the absence of constitutional provisions making a distinction between municipal subscriptions to stock and municipal appropriations of money or credit, there was no solid ground upon which, so far as legislative power was concerned, to rest such a distinction. "Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers." (Olcott *v.* Supervisors, 16 Wall., 91; Town of Queensbury *v.* Culver, 19 Id., 91.)

4. The only remaining objection to the judgment is that the bonds were delivered to the consolidated company, when they were not voted to that company. We concur with the court below in holding that the aid voted must be deemed to have been given in view of the then existing statute, authorizing two or more railroad companies, forming a continuous or connected line, to consolidate and form one corporation, and investing the consolidated company with the powers, rights, property, and franchises of the constituent companies. (County of Scotland *v.* Thomas, 94 U. S., 682; Town of East Lincoln *v.* Davenport, Id., 801; Wilson *v.* Salamanca, 99 U. S., 504; Nugent *v.* The Supervisors, 19 Wall., 252; Empire *v.* Darlington, 101 U. S., 91; Menasha *v.* Hazard, 102 U. S., 81; Harter *v.* Kerno-

chan, 103 U. S., 574; Tipton Co. *v.* Locomotive Works, Id., 532, 533.) The bonds were, therefore, rightfully delivered to the new or consolidated corporation.

We perceive no error in the judgment. It is affirmed.

AFFIRMED.

WESLEY B. BONNIFIELD v. GEORGE F. PRICE.

March 27, 1882.

1. Hecht *v.* Boughton, *ante*, p. 301, followed.
2. In cases of trials not by jury a statement of facts is necessary to enable this court to review the decision of the lower court.

ERROR to the Supreme Court of the Territory of Wyoming.

John W. Hammond, for plaintiff in error.

No counsel appeared for defendant in error.

WAITE, C. J.—This is a writ of error to bring here for review a judgment of the Supreme Court of the Territory of Wyoming in a case where the trial was not by jury. It is therefore dismissed on the authority of Hecht *v.* Boughton, decided at the present term. The appropriate remedy in this case, under the act of April 7, 1874, (ch. 80, Sup. Rev. Stat., 12,) was by appeal.

But if we could treat this writ of error as an appeal, the case is in no condition for examination here, because there is no such statement of fact in the record as the law requires. The bill of exceptions taken in the District Court contains all the evidence, and as the Supreme Court directed a judgment in favor of the defendant, it is clear that court passed on other questions than such as were presented on the rulings in the admission of evidence. Under these circumstances a statement of facts such as the statute requires is necessary to enable us to re-examine the case.

The writ is dismissed. DISMISSED.

BENJAMIN U. KEYSER, FLODORADO HOWARD, JAMES G. SMITH, AND THOMAS H. G. TODD *v.* HENRY H. FARR, CHARLES HARBAUGH, DAVID D. HAYS, JAMES P. TODD, JACOB B. RAND, LUCY E. SHIELDS, R. F. HOLLIMAN, J. R. MCINTOSH, AND THE COLUMBIAN BANK NOTE COMPANY.

March 27, 1882.

After the acceptance of the bond required by the judge of the lower court in awarding a supersedeas, the jurisdiction of the lower court ceased and of this court vested, and the lower court had no jurisdiction to make an order requiring additional security, and, in default thereof, vacating the former allowance of an appeal.

APPEAL from the Supreme Court of the District of Columbia.

Motion on the part of the appellants for a writ of supersedeas, and on the part of the appellees to dismiss.

West Steever and *A. C. Bradley*, for appellants.

W. Hallett Phillips and *W. A. Maury*, for appellees.

WAITE, C. J.—The decree in this case was rendered on the 26th of October, 1881. The record also shows that the court on the same day entered an order allowing an appeal and fixed the amount of the bond. On the 29th and 31st of October bonds for the appeal and supersedeas were executed by all the several appellants, and approved by the chief justice of the court. On the last day named the case was docketed in this court and a transcript of the record filed. Afterwards, on the 14th of November, but during the term at which the order allowing the appeal was entered, the appellees moved the court below to require additional security from the appellants, Keyser, Howard, and Smith. On the hearing of this motion the court entered an order purporting to set aside and vacate the former allowance of an appeal, but at the same time made a new allowance to take effect on that day.

Upon this state of facts the appellants, fearing that execu-

tion may issue notwithstanding their appeal docketed here, move for an order restraining the court below from proceeding to enforce the decree, and the appellees move to dismiss: first, because the allowance of the appeal has been vacated, and second, because the value of the matter in dispute is less than $2,500.

After the acceptance of the bonds for the appeal and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In Goddard *v.* Ordway, 101 U. S., 745, there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term. In Draper *v.* Davis, 102 U. S., 371, however, it was decided that after a bond had been accepted by one of the justices of the court, in accordance with such an order of allowance, the jurisdiction was transferred to this court. Here there was not only the acceptance of a bond, but an actual entry of the case here. In this way clearly the court below was deprived of power to make its order of November 14. It follows that the motion to dismiss, so far as it is predicated upon the order of the court below vacating its allowance of the appeal, must be denied, and that the supersedeas which followed in law from the acceptance of the bond by the chief justice is in force. Such was our ruling in Draper *v.* Davis, *supra*, on a similar motion at the last term.

The questions presented by the other branch of the motion to dismiss are important, and have not been directly settled, as we think, by any decision yet made by this court. Their further consideration is postponed until the case is heard on its merits.

K DENIED.

Opinion of the court.

CYRUS NICKERSON ET AL., OWNERS AND CLAIMANTS OF SCHOONER S. C. TRYON, v. THE MERCHANTS' STEAMSHIP COMPANY OF CHARLESTON, S. C.

March 27, 1882.

Under the act of February 16, 1875, a bill of exceptions is only necessary to ingraft upon the record such rulings of the court, excepted to at the time, as otherwise would not be a part of it; but the findings of the court and errors arising on them are reviewable without any bill of exceptions.

APPEAL from the Circuit Court of the United States for the District of Maryland.

Motion to dismiss, with which is united a motion to affirm.

No brief filed for appellants.

John H. Thomas and *George Leiper Thomas*, for appellee.

WAITE, C. J.—A bill of exceptions is not necessary to give this court jurisdiction of an appeal in admiralty under the provisions of the act of February 16, 1875, chap. 77, Sup. Rev. Stat., 135. That act expressly provides that the review here shall extend to the determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. At law a bill of exceptions is only used to put into the record that which would not appear without. The findings which the statute requires must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict, as to which the inquiry is always open in the reviewing court, whether, when taken in connection with everything else that appears, it is sufficient to support the judgment.

The motion to dismiss must, therefore, be overruled; but on looking into the record we are satisfied the appeal was taken

for delay. The only question presented arises on the findings of fact. From these it appears that the collision was due solely to an unjustifiable change of course by the schooner when the vessels were in close proximity, which baffled the steamer in her efforts to pass in safety. It is so well settled that a steamer is not liable for the consequences of a collision occurring in this way that we do not deem it proper to retain the cause for further consideration.

The motion to affirm is granted. GRANTED.

THE MEMPHIS AND ST. LOUIS RAILROAD COMPANY v. JOHN R. LOFTIN, COLLECTOR OF JACKSON COUNTY.

April 3, 1882.

1. Under a charter of a railroad exempting its capital stock and dividends to a certain amount from taxation, lands granted to the company by the State to aid in the construction of the railroad are not exempt.
2. An Arkansas statute providing that certain swamp lands should be exempt from taxation for ten years or until reclaimed, *construed* to mean that they are exempt for ten years if not sooner reclaimed, but that the exemption ceases on reclamation.

ERROR to the Supreme Court of the State of Arkansas.

W. Y. C. Humes, for plaintiff in error.

A. H. Garland, for defendant in error.

WAITE, C. J.—This was a suit in equity begun in the Circuit Court of Jackson county, Arkansas, to restrain the collection of taxes imposed under the authority of the State upon certain lands in that county owned by the Memphis and St. Louis Railroad Company, plaintiff in error. The Supreme Court of the State affirmed a decree of the Circuit Court dismissing the complaint on demurrer. To reverse that judgment this writ of error has been brought.

Two questions are presented for our consideration: 1st.

Whether the State by imposing the tax has impaired the obligation of a contract in the charter exempting the capital stock of the company from taxation; and 2d. Whether it has impaired the obligation of a contract made with the purchasers of its swamp and overflowed lands for exemption from taxation.

1. As to the charter.

The section of the charter relied on is as follows:

"SEC. 21. The capital stock of said company, with all the immunities and franchises herein specified, and all machinery, cars, engines, or carriages belonging to said company, together with all their works and property, and all profits which shall arise from the same, shall be vested in the respective stockholders forever, in proportion to their respective shares; and the capital stock of said company, and the dividends, shall be exempted from taxation until a dividend of six per cent. is realized upon the capital stock, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempted from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be levied on said road or its fixtures which will reduce its dividends below ten per cent. per annum. Said stockholders shall not be bound or liable for any greater amount than the respective shares of stock which they or either of them own."

The averment in the complaint to bring the lands in question under this exemption is in the following words:

"3. And that the said lands were acquired by the plaintiff and are now held by it for the purpose of raising money to build said road, and that it is a part of the property of said company, fully represented by its capital stock and not otherwise, and that said road has not as yet been completed, and that no dividend has as yet been realized on said capital stock, or any part thereof."

In Railway Company *v.* Loftin, 98 U. S., 559, in passing upon a provision of the charter of the Mississippi Valley Rail-

road Company substantially like the section here relied on, this court held the exemption did not extend to lands granted the company by the State to aid in the construction of its railroad. Such lands, it was then said, were used in lieu of capital, and to the extent they could be made available relieved the company from the necessity of raising money through stock subscriptions. Like the court below, we are unable to distinguish the case made by this complaint from that. The only material averment of fact in this connection is that the lands in question are held by the company for the purpose of raising money to build its road. This is entirely consistent with their use in lieu of capital. It is true the complaint alleges that the lands are fully represented by the capital stock, but that is only as a legal conclusion from what was stated before. The facts showing why the lands represented the capital must be set forth. Those which have been stated are not enough, and consequently the legal conclusion which the pleader has drawn from them in the complaint cannot be sustained.

In the elaborate printed argument presented for the appellant, reference is made to facts not stated in the complaint. These we cannot consider. As the case was submitted on demurrer, only the averments in the complaint are before us. While we may take judicial notice of the several statutes of the State which are relied on, the complaint alone must be looked to for information as to the manner in which the lands were acquired and the purposes for which they are held. While it may be true, as is claimed, that under section 3 of the charter of the company lands might have been accepted in payment for increased stock, and that the lands in question were acquired in that way, it is not so stated in the complaint. Whether, if the facts as claimed in argument had been stated, the exemption contended for would follow, is not for us now to decide. Upon this branch of the case, as it comes to us, the judgment of the court below was, in our opinion, right, and must consequently be affirmed.

2. As to the swamp lands.

These were part of the swamp and overflowed lands donated by the United States to the State, and the State statute providing for their reclamation and sale contained the following:

"SEC. 14. Be it further enacted, That to encourage by all just means the progress and completion of the reclamation by offering inducements to purchasers and contractors to take up said lands, that the swamp and overflowed lands shall be exempt from taxation for the term of ten years, or until said lands are reclaimed."

That under this section purchasers of the land acquired a right by contract to exemption from taxation for the stipulated time, is not denied, and this court so decided in McGee *v.* Mathis, 4 Wall., 143. The only dispute is as to the time the exemption is to continue. The railroad company insists that it is for ten years absolutely, and thereafter until the lands are reclaimed; the State, that it is for ten years if the lands are not sooner reclaimed, but if they are, that it ceases on the reclamation. The Supreme Court of the State in The State *v.* Crittenden County, 19 Ark., 360, as early as January, 1858, gave the statute the construction now contended for by the State, and this decision has never been overruled. It was expressly recognized by the Supreme Court of the State in McGee *v.* Mathis, 21 Ark., 58, and by this court in the same case, which came here on writ of error, and is reported in the fourth of Wallace, *supra.* Counsel frankly concede that the language of the statute is ambiguous, and that the grammatical construction is in accordance with what has been ruled. All such exemptions are to be construed strictly. Every doubt is to be resolved in favor of the power to tax. Under such circumstances, if the question were an open one we should have little difficulty in reaching the same conclusion as the courts of the State have done. Manifestly, therefore, we are not now called upon to overrule what has been settled for nearly a quarter of a century.

It is expressly stated in the complaint that the lands held by

Syllabus.

the company were sold by the State more than ten years before this suit was begun. Consequently they are not exempt as swamp lands.

The judgment of the Supreme Court of the State is affirmed.

AFFIRMED.

GEORGE C. RIVES, ADMINISTRATOR OF GEORGE RIVES, v. RICHARD T. W. DUKE, JR., ADMINISTRATOR OF WM. P. FARISH.

April 3, 1882.

On the 5th of December, 1863, after the proclamation of emancipation, and in that part of Virginia the people of which were in rebellion against the United States, one resident therein sold and delivered to another a number of slaves, with warranty of title, but not of soundness, the purchaser covenanting "to pay on delivery the sum of twenty-five thousand dollars in bankable Confederate currency, and in addition to give his note," with two persons named as sureties, "for the further sum of twenty thousand dollars, to be paid in twelve months after call, in equal annual payments thereafter, or, at the purchaser's option, it may be, on call, all or a part paid;" and the seller covenanting "not to call upon the purchaser for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call." On the 1st of January, 1864, the purchaser, in lieu of the note, made to the seller two bonds, with the same persons as sureties, to pay eight thousand dollars "on demand, or twelve months thereafter, at the option of the obligors," and twelve thousand dollars "on demand, or two years thereafter, at the option of the obligors," "in the bankable currency of the day, according to the agreement of the 5th of December last;" "the said demand shall be made in writing by the obligee, his heirs or legal representatives only." Payment of the bonds was demanded in writing by the obligee after the end of the war of the rebellion, and when the bankable currency of Virginia consisted wholly of notes of the United States or of the national banks: *Held*, in an action on the bonds, That the plaintiff had no ground of exception (1) to the admission of evidence that, at the time of the making of the agreement and the bonds, Confederate currency was bankable and was the only currency in circulation in Virginia, the value of gold in relation to such currency was as nineteen or twenty to one, slaves were not being sold at all for gold, and these slaves were not worth in Confederate currency so much as forty-five

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thousand dollars, and that before the war, when the price of slaves was at its highest, such a lot of slaves would not have been worth more than a fifth of that sum in gold; (2) to an instruction to the jury that, if they found that the bonds were made in reference to Confederate currency, the plaintiff was entitled to recover the amount therein stipulated to be paid, at the value of Confederate money compared with national currency at the time of the making of the bonds.

ERROR to the Circuit Court of the United States for the Western District of Virginia.

This was an action of covenant, brought by the executor of the will, and prosecuted by the administrator *de bonis non* of George Rives, against the administrator of the estate of William P. Farish, a surety on two bonds.

The declaration alleged that on the 5th of December, 1863, in the county of Albemarle and State of Virginia, George Rives and George L. Peyton executed an agreement under seal, which began with a "list of servants sold to George L. Peyton," (giving the names and ages of thirty-three negroes, the oldest of whom were fifty-one years of age and the youngest were infants,) and the rest of which was as follows: "I have this day contracted to sell and deliver on the place on the 1st of January next to George L. Peyton the above list of negroes, thirty-three in number. The title thereto I warrant, but make no warranty of soundness. For the same negroes the said George L. Peyton agrees to pay on delivery the sum of twenty-five thousand dollars in bankable Confederate currency, and in addition to give his note, with William P. Farish and William H. Peyton as sureties, for the further sum of twenty thousand dollars, to be paid in twelve months after call, in equal annual payments thereafter, or at said Peyton's option it may be, on call, all or a part paid. The said George Rives covenants he will not call on said Peyton for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call. The said postponed payment to carry interest from 1st January next, and to be annu-

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ally paid at Monticello Bank. The said George Rives further engages to furnish said Peyton one hundred barrels of corn at twenty dollars per barrel, to be delivered on the place as soon as gathered, and the money therefor to be paid down in Confederate bankable currency. In witness whereof and mutual obligation to perform our respective engagements, we this day, 5th of December, 1863, have signed our hands and seals."

The declaration then alleged that on the 1st of January, 1864, in pursuance of that agreement, Rives delivered the negroes to Peyton on the farm in Albemarle on which Rives then resided, which was "the place" referred to in the agreement, and also delivered the one hundred barrels of corn, and Peyton paid to Rives in bankable Confederate currency $25,000 in part payment of the purchase-money contracted to be paid for the slaves, and gave to Rives his two bonds, executed by William P. Farish and William A. Peyton as sureties, amounting in the aggregate to $20,000, the first of which bonds was in these terms: "On demand, or twelve months thereafter, at the option of the obligors, we promise to pay in the bankable currency of the day (according to agreement of the 5th December last) to George Rives, his heirs or assigns, eight thousand dollars, with interest from date, to be annually paid on the 1st January at Monticello Bank, Charlottesville; the same being in part of the purchase-money for thirty-three negroes, the title whereof is warranted, but no warranty is made of soundness. The said demand shall be made in writing by said George Rives, his assigns or legal representatives only. In witness whereof we have hereto put our hands and seals this 1st day of January, 1864;" and the other bond was precisely like the first, except in substituting the words "two years" for "twelve months," and "twelve thousand" for "eight thousand;" and that these bonds were delivered and accepted as a compliance on the part of Peyton with the provision in the previous agreement to give his note for $20,000.

The declaration further alleged that in August, 1866, before the institution of this suit, Rives demanded in writing of the

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obligors payment of the principal and arrears of interest of the bonds; and that, with the exception of the interest for one year, which fell due on the 1st of January, 1865, and which was paid, no part of the principal or interest had been paid.

The defendant demurred generally to the declaration, and pleaded covenants performed and covenants not broken, and twenty-five special pleas, which set forth at length, and in various forms, that the bonds were executed in consideration of part of the price of thirty-three negroes which Rives agreed to sell and did sell and deliver to Peyton, with warranty of title as slaves, after the proclamation of emancipation issued by the President of the United States on the 1st of January, 1863; and from that date until after the sale and delivery of the negroes both Rives and Peyton were participants in the then existing rebellion against the United States, and they and the negroes were residents of Albemarle county, in the State of Virginia, which were designated in the proclamation among the States and parts of States the people of which were in rebellion against the United States, and the negroes were there held as slaves, and were by the proclamation ordered and declared to be thenceforward free, and therefore, at the time of the contract, sale, and delivery, were free persons; that before the demand of payment, or the institution of this suit, and by action of the sovereign authority and Government of the United States and of the State of Virginia, and by the amendments of the Constitutions of the United States and of the State of Virginia, slavery in Virginia had been abolished, and these negroes had been made, recognized, and declared to be free persons; that afterwards Peyton, in pursuance of the proclamation, was, by the authority and power of the executive government of the United States, including the military and naval authorities thereof, wholly deprived of these negroes; that by reason of the premises the warranty of title was broken, and the consideration of the bonds failed; that the contract, sale, and delivery were in direct contravention of the policy of the Government of the United States, as manifested by the proc-

lamation, and it had become unlawful to make or to enforce in the courts of the United States, or of the State of Virginia, any contract of the plaintiff's testator whereby these negroes had been or were treated or dealt with otherwise than as free persons; that the plaintiff's testator, being one of the persons included in the offer of amnesty and pardon contained in the proclamations of the President of the 8th of December, 1863, and the 29th of May, 1865, had accepted the same upon the terms and conditions therein set forth, and had taken the oaths therein prescribed, and had also received from the President a special pardon upon the same conditions; and that upon each of these grounds the plaintiff could not maintain this action.

The defendant also filed a notice "that on the trial of this cause he will insist upon his right to have the bonds sued upon scaled according to the provisions of chapter 138 of the Code of Virginia (edition of 1873) as bonds which were either, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate State treasury notes, or were entered into with reference to such notes as a standard of value."

The plaintiff joined issue on the first and second pleas, and demurred to the twenty-five special pleas. The court overruled the demurrer to the declaration, and sustained the demurrers to the special pleas.

At the trial of the issues of fact, the plaintiff introduced evidence tending to prove the allegations of the declaration, and that at and ever since the date of the demand in writing, in August, 1866, the bankable currency of Virginia consisted wholly of United States notes, commonly called greenbacks, and of national bank notes, which have always been of about equal value in their relations to gold.

The defendant offered evidence tending to prove the following facts: "1. That Confederate currency was the only currency in circulation in Virginia in December, 1863, or January, 1864. 2. That in December, 1863, the value of gold in relation to such currency was as 20 to 1, and in January, 1864, as

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19 to 1. 3. That of the thirty-three slaves sold by George Rives to George L. Peyton, one woman and her two children were scrofulous, and another woman a cripple; and that in December, 1863, and January, 1864, the said thirty-three slaves were not worth in Richmond, Virginia, in Confederate currency, as much as $45,000, and that they were worth less in Albemarle, where they were sold, than in Richmond. 4. That such a lot of slaves, before the late war, even when the price of slaves was at its highest, would not have been worth more than $8,000 or $9,000. 5. That in December, 1863, and in January, 1864, all Confederate currency in circulation was bankable. 6. That as early as the fall of 1863 there was a general expectation among the people of Virginia that the Confederate Congress would adopt measures to reduce the volume of Confederate money, and that the value of such money would be thereby much increased. 7. That in point of fact the Confederate Congress, in February, 1864, did pass a law taxing to the extent of 33⅓ per cent. all Confederate currency which should not be invested in 4 per cent. Confederate bonds on or before the 1st of April, 1864, the effect of which law was to depreciate still further the value of Confederate currency then in circulation; and that after the 1st of April, 1864, the Confederate money issued prior thereto ceased to be bankable. 8. That in December, 1863, and January, 1864, slaves were not being sold at all for gold. 9. That about the same time Tucker Coles, of Albemarle, living five or six miles from George Rives, owned about two hundred slaves, mechanics and field hands, and averaging in value better than the slaves of George Rives; that he tried to sell a large number of said slaves at $50 a head, in gold, but could not, and that he would have sold them at $30 a head, in gold, had it been offered to him. 10. That all of the slaves purchased of George Rives by George L. Peyton perished as property on his hands at the close of the war. 11. That in August, 1866, the premium on gold, as compared with national currency, was 49 per cent.; in August, 1867, it was 41 per cent., and in

August, 1868, 45 per cent.; and that at this time such premium is only ½ of 1 per cent."

To the introduction of each and every part of this evidence the plaintiff objected, and moved the court to exclude the same: "1st. Because the contract sued upon is in writing, and its meaning free from ambiguity, obscurity, or uncertainty of any kind, and cannot therefore be explained, added to, or in any manner varied by parol evidence. 2d. Because the evidence offered does not come with the scope or meaning of the statute of Virginia in reference to Confederate contracts, which was intended to apply only to contracts for the payment of dollars in general, and not to those in which the kind of dollars is specifically expressed, or becomes certain by some event or contingency mentioned in the contract. 3d. Because if, according to the true interpretation of the Virginia statute just referred to, it makes parol testimony admissible to explain, add to, or in any manner vary a contract in writing entered into prior to its enactment, and which is in no way ambiguous or uncertain, then the statute is a violation of the Federal Constitution, because it not only impairs but destroys the obligation of the contract, making a new one in its stead. 4th. Because the evidence is irrelevant, since if all the facts which it legitimately tends to prove were admitted they would show no defense."

But the court overruled the plaintiff's objections and admitted the evidence, and to the rule admitting it the plaintiff excepted.

The plaintiff asked the court to instruct the jury as follows:

"First. If they find that the contract in writing between George Rives and George L. Peyton, dated the 5th of December, 1863, and given in evidence by the plaintiff, is the contract referred to in the bonds sued on, then the contract and bonds are to be construed together, and, so construed, they import in themselves not a contract to be paid absolutely in Confederate money, or any other specific currency, but a contract of hazard, that is to say, a contract payable in whatever

currency should be bankable at the respective dates when the obligors were bound to pay said bonds, that is to say, on the 30th of August, 1867, as to the smaller bond, and the 30th of August, 1868, as to the larger bond. Second. If the jury find that the contract of the 5th of December, 1863, and two bonds of the 1st of January, 1864, given in evidence by the plaintiff, contain the true understanding and agreement of the parties as to the currency in which said bonds were to be paid; that more than two years before the institution of this suit George Rives demanded payment of said bonds of each of the obligors therein, and in the mode agreed upon; that at the time of said demand, and ever since, bankable currency in Charlottesville and throughout Virginia consisted wholly of national bank notes and greenback notes of the United States Government, and that these have always been equal in their relation to gold,—then the jury must find for the plaintiff the face amount of the bonds, less the one year's interest credited thereon. Third. There is no evidence in the case to warrant the jury in finding that there was any other agreement or understanding between the parties, as to the kind of currency in which the bonds were to be paid, than that which is contained in the written contract and bonds themselves."

But the court refused to give the instructions requested, or either of them, and instructed the jury as follows: "If the jury find from the evidence that George Rives and George L. Peyton on the 5th of December, 1863, entered into the agreement offered in evidence, and in pursuance thereof, and in accordance with its terms Rives delivered the negroes to Peyton, and the bonds sued on were given, on which the defendant's intestate was surety, then the plaintiff is entitled to recover the amount stipulated to be paid in said writings obligatory in the currency of the United States at its value at the time the same fell due, according to their tenor and effect, unless the jury find from the evidence in the cause that the said writings obligatory were at the time made and understood by the parties thereto to be made payable in Confederate

money. And if the jury find from the evidence that the said bonds or writings obligatory were made in reference to Confederate currency, then the plaintiff is entitled to recover the amount stipulated to be paid in such bonds, at the value of Confederate money compared with national currency at the time of the making thereof, with interest from the time said bonds according to their tenor and effect became payable. But if the jury find from the evidence that the bonds and contract offered in evidence were made in view of the uncertainty of the value of the then or future bankable currency of the place of payment, and that each party, in entering into the contract, took the risk of what money should be current at the time for payment of said bonds according to the tenor and effect thereof, then the plaintiff, if the jury find that the parties executed the contract offered in evidence, and the bonds offered in proof in pursuance thereof, is entitled to recover the sum nominated in said bonds in national currency at the time the same became due, with interest thereon."

The plaintiff excepted to the refusal to give the instructions requested, and to the instructions given, upon the same grounds on which he had objected to the admission of the evidence offered by the defendant.

The jury, by their verdict, "find for the plaintiff on the issues joined, and assess his damages at one thousand dollars, with interest at the rate of six per cent. per annum from the 1st of January, 1865, till paid, that being the scaled value as of the 1st of January, 1864, of the nominal amount of the bonds sued on, less the one year's interest thereon;" and the court gave judgment for the plaintiff accordingly.

W. W. Crump and *E. R. Watson*, for plaintiff in error.

William J. Robertson, *R. T. W. Duke*, and *S. V. Southall*, for defendant in error.

GRAY, J.—It is settled by the decisions of this court that a contract made within the so-called Confederate States during

the war of the rebellion, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, may be shown by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in Confederate currency; and that if that fact is shown, in an action upon the contract, no more can be recovered than the value of that currency in lawful money of the United States. (Thornton *v.* Smith, 8 Wall., 1; Confederate Note Case, 19 Wall., 548, 559; Wilmington and Weldon Railroad Co. *v.* King., 91 U. S., 3.)

By the bonds in suit the obligors promise to pay "on demand, or" (in the first bond) "twelve months," and (in the second bond) "two years thereafter, at the option of the obligors," eight thousand and twelve thousand dollars respectively, "in the bankable currency of the day, according to the agreement of the 5th December last." In the agreement so referred to, which is a contract for the sale of slaves, that part of the price which is to be paid on the delivery is clearly expressed to be "the sum of twenty-five thousand dollars in bankable Confederate currency;" and the agreement upon its face affords strong ground for inferring that "the further sum of twenty thousand dollars to be paid in twelve months after call," and as to which the seller covenants not to call for specie, but to be satisfied with the "bankable currency of the day," is also to be paid in Confederate currency, and that the effect of this clause is not varied by the omission to repeat therein the word "Confederate," the use of which in the previous as well as in the subsequent part of the agreement shows the kind of bankable currency which the parties to the agreement, and to the bonds that refer to it, had in mind. And a consideration of the nature of the agreement and of the circumstances under which it was made removes all doubt upon the subject.

It was a contract for the sale and purchase of slaves, made and to be performed in, between parties residing in, that part of the State of Virginia from which the authority of the national government was excluded by the rebel armies, and was

made after the proclamation of emancipation issued by the President of the United States had declared all slaves in that district to be free. If the so-called Confederate States should achieve independence, the money of the United States would be the money of a foreign country. If the national authority should be re-established over the insurgent districts, the slaves, for part of the price of which the payment was to be made, would be free, in fact and in law, and be wholly lost to the purchaser. In view of either alternative, the parties cannot reasonably be held to have contemplated payment in any other currency than that of the Confederate States.

That part of the evidence introduced by the defendant, of the competency of which, in the light of the decisions in Thorington *v.* Smith, and in the Confederate Note Case, above cited, there can be no question, leads to the same conclusion. It tended to prove that at the time and place of the making of the agreement and of the bonds the only currency in circulation or bankable was Confederate currency; the value of that currency in relation to gold was as one to nineteen or twenty; slaves were not being sold at all for gold, and these slaves were not worth more than the stipulated price computed in Confederate currency, and would never, even before the war, have been worth more than a fifth of that price in gold.

The competency of the evidence as to the popular expectation of an increase in the value of Confederate currency, and as to the price at which another person would or could have sold other slaves, is much more doubtful, and need not be considered inasmuch as it was not specifically contested at the argument, probably because its exclusion could not vary the result so long as the evidence which we hold to be competent is admitted.

The facts of the case clearly distinguish it from Gavinzel *v.* Crump, 22 Wall., 308, and bring it within that class of cases in which the Court of Appeals of Virginia has held contracts made during the war to be payable in Confederate currency only. (See M'Clung *v.* Ervin, Hilb *v.* Peyton, Bowman *v.* Mc-

Chesney, and Calbreath *v.* Virginia Porcelain Co., 22 Grattan, 519, 550, 609, 697.)

For these reasons, we are all of opinion that the parties to the bonds in suit contemplated payment in Confederate currency; and it is immaterial to consider whether, by reason of the option given to the seller in the original agreement, and to the obligors in the subsequent bonds, the value of that currency should be estimated as of the date of the bonds or as of the date of the demand of payment, because the earlier estimate, upon which the instructions of the court and the verdict of the jury proceeded, is the more favorable to the plaintiff.

As no error prejudicial to the plaintiff is shown in the rulings and instructions of the court, and as the defendant has not and could not have appealed from the judgment below, it would be extrajudicial to pass upon the further position of the defendant, that the bonds sued on have no legal validity or effect, the judgment is affirmed.

AFFIRMED.

THE UNITED STATES v. NANCY HUNT, EXECUTRIX OF F. S. HUNT, DECEASED, JOSHUA GREEN, JOHN ROBINSON AND H. C. DANIELS.

April 3, 1882.

1. A treasury transcript containing an account of the United States with a tax collector under the internal revenue act, in which are included collections of assessments made under a former term of office, is *prima facie* evidence of the fact of indebtedness which it certifies, in a suit on his bond for a succeeding term; there being nothing to show that during his succeeding term he had not collected assessments so made during the preceding term.
2. But even if collected during the preceding term, this was not sufficient to exclude entirely such a transcript containing charges admittedly collected during the succeeding term.
3. Receipts of the collector are admissible in evidence against him, and being part of his official transactions, are originals, even though they are summaries or abstracts of alphabetical lists containing in detail the persons and amounts assessed.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

S. F. Phillips, Solicitor-General, for plaintiffs in error.

W. L. Nugent, for defendants in error.

MATTHEWS, J.—This was an action brought by the United States upon the official bond of Fidelio S. Hunt, as collector of taxes, under the internal revenue act, for the second district of Mississippi. Hunt was sued as principal, and having died pending the suit, it was revived against his executrix. The other defendants were sureties. The condition of the obligation was that the said Hunt "shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, &c." It is alleged in the declaration that the bond was delivered and approved on July 19, 1866, on which day Hunt entered upon the discharge of the duties of his said office, and continued therein until on or about May 23, 1867. The breach alleged was that during that period he became indebted to the United States in the sum of $139,563.15, received by him as such collector for and on account of taxes due to the United States, being a balance reported to be due from him upon the adjustment of his account as such collector in the Treasury Department, of which a duly certified copy was filed, and which he had refused to pay. The sureties filed joint pleas, and the executrix pleaded separately. The pleas were alike, and amounted to a general denial of every allegation necessary to constitute a liability.

There was a verdict and judgment for the defendants. The errors assigned arise upon the rulings of the court upon the trial upon questions of evidence presented by a bill of exceptions.

The plaintiff offered in evidence the certified transcript of

Hunt's account from the books of the Treasury Department. The certificate of the fifth auditor, accompanying it, states that he has examined and adjusted "an account between the United States and Fidelio S. Hunt, late collector for the second district of Mississippi, from July 19, 1866, to May 23, 1867, and finds him chargeable as follows, under bond approved July 19, 1866." The debit side of the account is, "to amount of assessment lists receipted for, per form 23½, viz." Its first item is dated July 28, 1866, and is to "amount receipted for as December, 1865, list." It also embraces similar debits, of the same and subsequent dates of entry, for lists of January, February, April, May, and June, 1866. The last five items on the same side of the account bear date, as to the entries, subsequently to May 23, 1867, but are for amounts receipted for as lists of January, 1866, April and May, 1867. The credit side of the account contains items of cash paid of dates subsequent to May 23, 1867, and also gives credit for amounts collected by successors in office on lists receipted for by Hunt, and also for amounts collected by him as collector under his first bond on lists receipted for by him as collector under second bond. This statement of account shows a balance due the United States of the amount claimed in the declaration.

The transcript included, as part of the statement of account and explanatory of it, a statement of differences showing and accounting for the discrepancies between the balance exhibited by the collector's own account and that ascertained by the adjustment. From this it appeared that the balance due the United States by the collector's account to March 31, 1867, since which date he had rendered none, was $76,756.17, showing a difference to his debit of $62,706.98. This is explained, in part, by showing the whole amount of assessments of form 23½, charged under his first bond and under his second bond separately, which he had failed to give correct credit for, to the amount of $137,430.78; in part, by showing the amount of cash deposited by him under his first and second bonds respectively, and that he had twice credited himself with $169,-

517.83 on account thereof; and by other errors, the whole amounting to $702,434.36. On the other hand, this is reduced to the sum of $62,706.98, the difference to be accounted for, by credits for taxes abated by the adjustment, by credits therein for collections by successors in office on bills receipted for by him during his term, and by amount claimed and credited in his accounts as collections on cotton. A list of warrants covering into the treasury the amounts of cash deposited is appended, showing the amount of each, and on account of which bond it was paid.

To the introduction in evidence of this transcript objection was made on the part of the defendants, "upon the ground that the balance exhibited by the said account is the result of the transactions of both terms of the defendant's service, whereas the suit is upon a bond which covers only the transactions of the second term; and because it embraces transactions made by the collector after his removal from office and after the appointment and qualification of his successor; and the balance is in part made up of these transactions, occurring when the collector no longer sustained any official relation to the United States, and after the alleged breach had occurred." And in support of their said objections the defendants, by their attorneys, the bill of exceptions proceeds to state, introduced in evidence the bond of Martin Keary, the successor of the said Hunt as such tax collector, showing that the same was approved on April 29, 1867. Thereupon the objections to the introduction of the certified account in evidence were by the court sustained, and the same was excluded, the court holding that the said certified statement should stand and be considered only as a bill of particulars annexed to the plaintiff's declaration.

This ruling was excepted to, and is assigned for error by the plaintiff in error.

It was an irregularity to permit the defendant to interject into the plaintiff's case testimony upon the merits of the defense in support of his objection that the evidence offered was

irrelevant, and the testimony interposed was not by itself sufficient to establish the date on which Hunt ceased to hold an official relation to the United States as collector, for it did not show when his successor actually entered upon the discharge of the duties of the office. But, passing by without further comment, these minor errors, we find that the objection to the transcript of the account, as matter of evidence, is without foundation either in fact or in law.

It was assumed on both sides, though there is no proof to that effect in the record, that Hunt had filled a prior term as collector, being his own successor, and it was admitted that his second term commenced on July 19, 1866. The objectionable items in the first part of the account charge him with amounts of assessment lists receipted for per form 23½ on dates subsequent to the beginning of his second term, though, being described as lists for specified months prior to July, 1866, it is argued that he could not be chargeable upon his second bond with those sums. But this does not follow; for it is entirely consistent with the description of the lists that the collector actually received the taxes paid upon them, after the date of his second term, and just as he is charged with them in this account. And so, on the other hand, with similar items charged upon receipts of assessment lists, of dates subsequent to May 23, 1867, the alleged date when his second term expired. It is consistent with the nature of those charges that they were for moneys received on account of taxes paid on account of these lists, and received by him before the end of his second term. The account charges him with distinct sums of money collected by him. They are identified by reference to assessment lists for particular months, and then by the dates of his receipts to the government for the lists, upon form 23½. No dates are traced in the account as those on which the taxes were actually collected by him, but the certificate of the Treasury Department declares it to be an account between the United States and the collector from the beginning to the end of the period covered by the bond in suit, and there is nothing

on the face of the account which necessarily contradicts this statement. The certificate has the legal effect of making the transcript *prima facie* evidence of the fact of indebtedness which it certifies, unless upon the face of the account it necessarily appears to be otherwise.

But the ruling of the court in excluding the transcript is equally untenable upon the contrary supposition that the items on account of which the objection was sustained were on their face such as could not be charged against the defendants upon the bond in suit; for, rejecting these items, there remained many others with which the collector and his sureties upon his second bond were admitted to be chargeable, and the transcript was clearly admissible in proof of these. The presence of the objectionable items could not prejudice the defendants, for, on the supposition, they were separable from the remainder of the account by mere inspection. On the other hand, their presence might be important to the government, as explanatory of corresponding items upon the credit side of the account; particularly in view of the ruling of the court which rejected the transcript as evidence against the defendants, but required it to remain upon the record as proof against the United States.

For the same reasons the subsequent ruling of the court must be held to be erroneous, by which it excluded the receipts of the collector on form 23½, which constituted the items upon the debit side of the account. Even if the receipts alone were not sufficient in each case to charge the collector with the sums charged as taxes collected upon the assessment lists, nevertheless they were competent evidence, which by other testimony might be made full proof until overcome by a successful defense. The ground of the objection was that the form 23½ was a receipt for alphabetical lists, showing in detail the names of persons assessed for taxes and the amounts severally due from each, and that these alphabetical lists were primary and better evidence to charge the collector than the receipt on form 23½, which expressed merely the aggregate amount of the alphabetical lists. But the receipts offered were signed by the col-

lector, on their face constituted a part of his official transactions, and formed the very basis of the account against him upon the books of the Treasury Department. The originals would be competent against him, for they are not secondary evidence, although they may show the existence of other documents more in detail. The law gives to a copy certified by the Treasury Department at least the same force in evidence which the original would otherwise have.

The ruling of the court rejecting the original statement signed by the collector, showing the amounts collected, and amounts abated as uncollectible during the month, and those collected on May 18, 1867, was likewise erroneous for the same reasons.

For these errors the judgment of the Circuit Court is reversed, with instructions to grant a new trial; and it is so ordered.

REVERSED.

EDWARD MELLON AND WILLIAM MATTHEWS v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

April 3, 1882.

Where a license is in the possession of the party claiming under it, and is absolute and unconditional on its face, the burden of proof is on the licensor when he asserts that it was delivered as an escrow.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

H. T. Fenton and *Furman Sheppard*, for appellants.

No counsel appeared for appellee.

WOODS, J.—The bill charged infringement of letters-patent dated October 2, 1866, granted to Edward Mellon, one of the complainants, for an improvement in the mode of attaching tires to wheels of locomotives. Mellon had assigned a one-

half interest in his letters-patent to William Matthews, and they two were joined as complainants.

The defendant pleaded that while Mellon was the sole owner of the patent, to wit, on May 15, 1867, he had for a valuable consideration granted a license in writing to the defendant for the full term of the patent to use the improvement described therein upon all its locomotives, locomotive tires and wheels.

The complainants took issue on this plea. The Circuit Court heard the cause upon the pleadings and evidence and dismissed the bill. The appeal of the complainants has brought up the case for our consideration.

To support the issue on its part the defendant produced a license in writing, signed and sealed by Mellon, dated May 15, 1867, which, its execution being admitted by Mellon, proved every allegation of the plea.

The appellants asserted, however, that the license had been delivered as an escrow to John Brisbin, the president of the appellee, in order that he might present it at the next meeting of the board of directors of the company, and if the board consented to pay and did pay thirty-five hundred dollars for the license, it was to take effect, otherwise not; and that nothing whatever had been paid for it. The appellee denied this, and asserted that the delivery was upon a valuable consideration received by Mellon, was absolute, and without condition or reference to any future contingency.

As the license is in the possession of the appellee and is produced by it on the trial, and on its face is absolute and without any limit or condition, the burden of proof is upon the appellants to show that it was delivered as an escrow.

The only evidence to maintain their side of the controversy is the deposition of Mellon. On the part of the appellee is the testimony of Brisbin, its president, to whom the license was delivered. His deposition contains a direct and explicit denial of the testimony of Mellon in reference to the delivery of the license, and he is corroborated by the evidence of another

witness, who was superintendent of the rolling stock of the appellee at the time the license was delivered.

The case turns upon a single question of fact. The burden of proving that fact is on the appellants, but the weight of the evidence is with the appellee.

The decree of the Circuit Court dismissing the bill was right and must be affirmed.

AFFIRMED.

THE MARINE AND RIVER PHOSPHATE MINING AND MANUFACTURING CO. ET AL. V. WILLIAM L. BRADLEY.

April 3, 1882.

1. A bond of a South Carolina corporation made originally payable to "W. J. Gayer, receiver," but with a subsequent indorsement by the obligor agreeing, in consideration of forbearance, to pay to bearer, becomes by such indorsement a negotiable instrument, although under seal, and its holder may sue on it in the Federal courts, although the original obligee could not.
2. The citizenship which would oust the jurisdiction of the Federal courts must be made to appear of record, and it will not be presumed that a party who might defeat the jurisdiction was a citizen at the institution of the suit merely because he was such at the time of the transaction out of which the suit arose.
3. Where a statute makes the stockholders of a corporation jointly and severally liable for its debts under certain circumstances, a court of equity, having acquired jurisdiction to enforce the lien of a debt due by the corporation, may, in the same proceeding, to avoid multiplicity of suits, enforce the individual liability of the stockholders.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

A. G. Magrath and *Samuel Lord, Jr.*, for appellants.

William E. Earle and *James B. Campbell*, for appellee.

MATTHEWS, J.—The Marine and River Phosphate Mining and Manufacturing Company, one of the appellants, is a corporation organized under the general statutes of South Caro-

lina, on March 15, 1870, with a subscribed capital of $500,000, the amount limited by the articles of association, of which but one-half had actually been paid in.

On December 28, 1872, it borrowed from William J. Gayer, receiver, appointed by the Court of Common Pleas for the county of Charleston, in a cause pending therein, of Dabney, Morgan & Co. against the Bank of the State of South Carolina, the sum of $20,000 of the funds in his hands, and which he was authorized so to invest.

As evidence of and security for the loan the phosphate company executed and delivered its bond, of which the following is a copy:

"STATE OF SOUTH CAROLINA,

"*Charleston County.*

"Know all men these presents, That we, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, are held and firmly bound unto William J. Gayer, receiver, in the sum of twenty thousand dollars, with interest thereon at the rate of ten per cent. annually, payable semi-annually, to be paid on the 1st day of July next ensuing the date hereof, for which payment, well and truly to be made, we, the said company, do hereby bind ourselves and our successors firmly by these presents.

"In witness whereof the said company have caused their seal to be hereunto affixed, the 28th day of December, A. D. 1872.

"We, the said company, do further covenant and agree that the above bond constitutes a lien upon the property of the said company, and that the same is issued under and pursuant to the provisions of section thirty-nine of chapter sixty-four of the general statutes."

It is signed by "D. T. Corbin, president Marine and River Phosphate Mining and Manufacturing Company of South Carolina," and countersigned by "Reuben Tomlinson, treasurer," and sealed with the corporate seal.

Subsequently to the maturity of this bond, C. C. Puffer,

who had become successor in the receivership to Gayer, on April 2, 1874, transferred and delivered it to D. T. Corbin, in exchange for 300 shares of the capital stock in the phosphate company owned by him. This transaction was reported by the receiver to the court as a payment of the note, and the shares of stock were carried as part of the fund in the hands of the receiver, and were afterwards sold by order of the court. No express order of the court is produced authorizing the transaction, but the accounts of the receiver disclosing it were passed and confirmed and the receiver discharged. Corbin at this time was still president of the phosphate company. The bond, while held by the original receiver, had been duly recorded in the office of the register for mesne conveyances as a lien upon the company's property.

On May 13, 1874, an indorsement was made upon the bond as follows:

"In consideration of further forbearance on the part of the holder of this bond till the 1st day of January, A. D. 1875, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina hereby promises, waiving all set-off or other defense, to pay this bond to bearer on the 1st day of January, A. D. 1875, with interest at the rate of twelve per cent. per annum from the 1st day of April, 1874, payable quarterly, and should said bond not be paid on the 1st day of January next, then thereafter interest shall be paid in the same manner and at the same rate as herein mentioned till paid."

This indorsement was signed "The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, by D. T. Corbin, president," countersigned by "Reuben Tomlinson, treasurer," with the corporate seal affixed.

The evidence on the point does not permit any doubt that this arrangement was made between Corbin and the company, acting with the full knowledge and express sanction of the directors. The treasurer, Tomlinson, testifies that he objected to taking any action upon the proposal of Corbin for an extension of payment as contained in the indorsement, without first

submitting the question to the board of directors. The form of the renewal was the one agreed to by them, and by them ordered to be indorsed on the bond. This was done with knowledge that Corbin then held it. The interest to be paid appears to be lawful and customary, being then the rate charged by banks. It was regularly paid by the treasurer to Corbin, and in December, 1876, a payment of ten thousand dollars was made to him by the treasurer on account of the principal. That payment was reported to the board of directors, some of whom had been consulted in regard to it by the treasurer before it was made; because, as he states, "the funds on hand at the time having been provided for other purposes, I did not feel at liberty to use them for that purpose without first consulting with such directors as were conveniently at hand." He adds: "Mr. Corbin frequently, during the months of January and February, 1877, requested me to arrange for the payment of the balance of ten thousand dollars principal and the interest due on said bond. The matter was brought to the attention of the directors by me, and no objection was made by them to the payment of said money if it could be raised without serious embarrassment to the company. Arrangements to pay said bond were finally made, and the money actually raised and deposited in bank for that purpose, subject, however, to conditions, the fulfillment of which was prevented by the change in the organization of the company which took place in March, 1877."

In June, 1877, Corbin transferred and delivered the bond to Bradley, the appellee, in consideration of ten dollars paid and his agreement to pay the amount still due on the face of it, less the ten dollars paid, as stated in a letter from Corbin to Bradley, making the offer, which was accepted, "only when you shall have collected the amount from the company, and what you shall collect from the company, less the cost and expenses of collection."

In answer to a question, on cross-examination, as to his motive and purpose in parting with the bonds in this way,

Mr. Corbin said "that the company had refused to pay the bond, and I believed if I held the bond I would be compelled to litigate the same with the company, and I believed if it passed into the hands of a third person, in good faith, that the company would pay it to him without a long and tedious litigation, having no prejudices against him, as I believed; and further, I did not wish to be a party plaintiff in an important suit against the company that I had been so long connected with as president."

On July 5, 1877, Bradley, being a citizen of Massachusetts, filed his bill in equity in the Circuit Court of the United States for the District of North Carolina against The Marine and River Phosphate Mining and Manufacturing Company, and several others, alleged to be citizens of South Carolina and stockholders in that corporation. It alleges that the bond is a lien upon all the property of the corporation, embracing certain described personal property, and the franchise granted to it by the State to dig, mine, and remove from the bed of the navigable streams and waters within the jurisdiction of the State the phosphate rock and deposits according to an act passed March 1, 1870. It also alleges that the defendants, charged to be stockholders in the corporation, have not fully paid up the amount of the capital subscribed by them, and that they are within the provisions of section 23 of chapter 64 of the general statutes of South Carolina, under which act the corporation was organized, which provides that "the members of every company shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company in manner aforesaid is paid in and a certificate thereof made and recorded as prescribed by the following section."

The bill contains the following averment: "That to bring a separate and distinct action at law against each of such stockholders would be a great hardship to your orator, inasmuch as a court of equity has full power to hear and adjudicate all the issues between your orator and the said several defendants,

thus preventing a multiplicity of suits; and by ascertaining the number of shares of the capital stock of the said Marine and River Mining and Manufacturing Company of South Carolina held by the said several defendants, the amount of the subscription paid upon each of said shares, and the amount still due and unpaid thereupon, can adjust and decree the amount which each of said defendants justly owes to your orator, and can afford him that relief which a court of law is unable to give."

The prayer of the bill is that the defendant, The Marine and River Phosphate Mining and Manufacturing Company of South Carolina, be decreed to pay the amount due upon the bond, with interest; that the same be declared to be a lien upon its property described in the bill, and that the same be sold for the payment and satisfaction thereof; and that the other defendants be decreed to be justly and severally liable for the amount of the said debt, and to pay on account thereof so much of the unpaid subscription of each share of the stock in said corporation held by them severally as shall be necessary to pay the same, and for general relief.

A final decree was rendered against the phosphate company and several of its stockholders, co-defendants, for the payment of the amount due on account of the said bond, for which execution was awarded, and a decree foreclosing the equity of redemption in the corporate property described in the bill, on which the bond is declared to be a lien, and directing its sale.

To review this decree the defendants below prosecute the present appeal.

Several questions arising upon the pleadings and evidence, and embodying the errors assigned upon the decree, will be considered in their order.

I. The first of these relates to the jurisdiction of the court.

It is objected in the first place that the complainant is the assignee of a chose in action on which no suit could have been maintained in the Circuit Court by his assignor, and that con-

sequently he is within the prohibition of the first section of the act of March 3, 1875. The answer to this objection is that the obligation sued on is a negotiable promissory note, and is therefore excepted out of the prohibition relied on. It is true that the bond as originally executed was payable to Gayer, receiver, simply, and was not negotiable; but the subsequent indorsement was a new and complete contract, upon a distinct and sufficient consideration, and, being payable to bearer, is negotiable by delivery merely. It is a negotiable note, within the meaning of the law merchant and according to the law of the place of the contract, notwithstanding it is an instrument under seal. (Langston *v.* South Carolina Railroad Co., 2 S. C., 251; Bank *v.* Railroad Co., 5 S. C., 158; Bond Debt Cases, 12 S. C., 250.)

It is further objected, however, that the transaction between Corbin and Bradley was fictitious and not real, and that the title to the bond remained in the former, so that the latter, not being the real party in interest, cannot maintain an action to enforce it; that the present suit is collusive, for the purpose of conferring jurisdiction upon the Circuit Court, and therefore within the rule declared in Smith *v.* Kernochan, 7 How., 216, Jones *v.* League, 18 How., 76, and Barney *v.* Baltimore, 6 Wall., 280, and enacted by the fifth section of the act of March 3, 1875, as construed in Williams *v.* Nottawa, decided at the present term.

The delivery of the bond by Corbin to Bradley, under the arrangement for its transfer, however, was a transfer of the legal title to the obligation. Whether the agreement was not also a transfer by Corbin of all beneficial interest in the bond, depends on whether Bradley was bound to account to him specifically for the net proceeds of its collection, or only to pay him so much money as they should amount to—a question which it is not necessary to decide, because it does not appear from this record but that Corbin could himself have maintained a suit in his own name in the Circuit Court upon the bond. It is nowhere distinctly alleged or shown that at the time this

suit was brought he was a citizen of South Carolina. That he was so at the time of the original transaction may be presumed or inferred from the circumstances; but, to confer or oust jurisdiction, when that depends on citizenship, the necessary facts must be distinctly alleged and admitted or proved. Upon the present state of the record the assumption could not have been made in his favor to sustain the jurisdiction if he were seeking as a citizen of South Carolina to prosecute an action; and equally it will not be made to defeat the jurisdiction, which otherwise is rightly invoked by the plaintiff below.

It is further objected that the jurisdiction in equity cannot be sustained, because the plaintiff had a complete and adequate remedy at law, so far, at least, as relief is sought against the stockholders individually upon their statutory liability.

That liability is a joint and several personal obligation to all the members of the company, unlimited except by the amount of the debts and contracts of the corporation, to which it extends. It is unconditional, original, and immediate, not depending on the insufficiency of corporate assets, and not collateral to that of the corporation upon the event of its insolvency. It is, in one aspect, a suretyship for the corporation, for by section 37 of the act, any stockholder, paying a debt of the company for which he is personally liable, is entitled to an action against it for indemnity, in which he may take the corporate assets, but is without recourse upon the property of any other stockholder.

The jurisdiction in equity, then, cannot rest upon the administration of a trust fund, as in cases where delinquent stockholders are charged with the obligation to make good their subscriptions to unpaid capital stock, or in those where a constitutional or statutory liability is imposed beyond the amount of the subscription to a fixed sum, but on each in proportion to his share in the capital stock. There the necessity of enforcing a trust, marshaling assets, and equalizing contributions constitutes a clear ground of equity jurisdiction.

Opinion of the court.

The statute under consideration prescribes no form of action, and the jurisdiction may be regarded as concurrent, both at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises. The thirty-fifth section of the act expressly authorizes separate actions at law against the company and against its officers in cases where, by the statute, the latter are made personally liable for defined delinquencies; while the thirty-sixth section provides that property of stockholders in cases where they are liable may be taken on attachment or execution issued against the company. In the present case there was an acknowledged jurisdiction to grant equitable relief, by enforcing the lien of the bond upon the corporate property, and, as incident to that, to make a decree against the corporation for the payment of the debt. Having jurisdiction for that purpose, it is entirely consistent with its principles and practice for a court of equity to extend it, so as to avoid a multiplicity of suits, and to give to the plaintiff a single and complete remedy. As the individual stockholder is bound by the judgment against the corporation, it is equitable that he should be present as a party, that he may have the opportunity to defend for himself; and in case of payment out of his property, he is entitled to be subrogated to the right of the creditor against the company, in order to indemnify himself out of the corporate assets. On these grounds, we think, the jurisdiction in equity is well supported.

II. The remaining grounds of defense have been, in effect, anticipated in the statement of the case. They are without merit or substance.

The title of the plaintiff below to the bond sued on cannot be assailed for want of authority in the receiver to transfer it, even if such a defense was open to the obligors, for it sufficiently appears that the transaction, if not previously authorized, was subsequently confirmed by the court.

Nor does the relation between Mr. Corbin and the company at the time of the transaction furnish any defense either at

Opinion of the court.

law or in equity. The relation undoubtedly was one of a confidential and fiduciary character, but there seems to be no ground in the evidence to challenge the good faith with which the business was conducted. The bond of the company was purchased from the receiver with his own means, and not those of those of the company; the value paid, so far as the testimony discloses, was full; and every step, when taken, was made known and assented to by the directors of the corporation. The transaction was legitimate in itself and beneficial to the company, and the dealing was not by the president with himself, but with the corporation, in fact, represented and acting by other directors, with full knowledge of all the facts.

The defense of payment was suggested by the circumstance that the receiver, after parting with the bond in exchange for the stock, reported it as paid in that way. So far as the fund in his hands was concerned, it might be so treated; but the company and its stockholders must be conscious that they have no right so to consider it.

We find no error in the decree, and it is accordingly

AFFIRMED.

DAVID E. JAMES v. MICAJAH MCCORMACK.

APRIL 3, 1882.

Motion to reinstate a cause *denied*, appellant giving no good reason for his default.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

Crockett & Blair and *John Ambler Smith*, for appellant.

John A. Campbell and *John W. Johnston*, for appellee.

WAITE, C. J.—This motion is denied. When the appellant was called and his appeal dismissed, the case had been nearly three years on the docket of this court. He had no brief on

file and was not present either in person or by counsel. Under these circumstances the appellees were entitled, under Rule 16, to a dismissal. No notice of their intention to enforce the rule was necessary. The appellant has not excused himself for his default, and his case is clearly within that of Hurley *v.* Jones, 97 U. S., 318, in which we announced our intention to enforce rigidly this salutary rule, and not to set aside defaults growing out of the neglect of counsel or parties except for very good cause.

DENIED.

WILLIAM G. WINSLOW AND HEZEKIAH WINSLOW v. BLISS O. WILCOX, OWNER AND CLAIMANT OF SCHOONER S. S. OSBORNE, AND BLISS O. WILCOX, OWNER AND CLAIMANT OF SCHOONER S. S. OSBORNE, v. WILLIAM G. WINSLOW AND HEZEKIAH WINSLOW.

APRIL 3, 1882.

1. Although a District Court in admiralty, by rule, requires appeals from its decisions to be in writing, yet where, in the decree, a party inserts a clause announcing his intention to appeal, and the court fixes the bond, and afterwards accepts the bond, the necessity of an appeal in writing was dispensed with, and the jurisdiction of the Circuit Court attached.
2. A provision by a rule of the District Court that its clerk should deliver the record to the clerk of the Circuit Court, if not complied with, does not prevent the Circuit Court from entertaining the cause.
3. A cross-appeal, even though the other appellant has docketed his appeal, must be prosecuted like all other appeals; and hence where an appellant did not enter his appearance in this court, or take any steps to make himself an actor for nearly two years after docketing his appeal, it was *dismissed* for want of prosecution.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

H. A. Terrell and *A. G. Riddle*, for appellants.

L. Prentiss and *Jacob D. Cox*, for cross-appellant.

Opinion of the court.

WAITE, C. J.—The question presented by the appeal of the Winslows is, whether the Circuit Court erred in taking jurisdiction of the appeal of Wilcox from the District Court. Section 631 of the Revised Statutes provides that from all final decrees of the District Courts in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds fifty dollars, appeals shall be allowed to the Circuit Court next to be held in such district, and the Circuit Court is required to receive, hear, and determine such appeal. It is not declared in this section what shall constitute an appeal from the District to the Circuit Court, any more than it is in section 692 what shall be an appeal from the Circuit Court to this court. Admiralty Rule 45 of this court provides that appeals from the District to the Circuit Courts, in admiralty cases, must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specifically made in a particular suit, or, in case no such rule or order is made, then within thirty days from rendering the decree; and, Rule 46, that in cases not provided for by the rules of this court, the District and Circuit Courts may regulate their own practice.

The District Court for the Northern District of Ohio provided by rule that appeals in admiralty to the Circuit Court should be taken within ten days from the date of the decree, unless further time was given by a special order of the judge; that the appeal should be in writing and specify particularly from what part of the decree, if less than the whole, it was taken; whether it was intended to make any new allegations or proofs, and, if so, what; whether it was intended to pray for any other relief, and, if so, what; and further providing that on the trial the appellant should be strictly confined to the specifications in his appeal. The rule also required that the appeal should be filed with the clerk, and from that time, security having been given, it should be considered perfected. It was then made the duty of the clerk, within twenty days,

unless a longer time should be allowed by the judge, to prepare and deliver to the clerk of the Circuit Court, together with the appeal, the record required by the fifty-second rule of this court, and that when this was done so much of the case as was appealed should be in the exclusive control of the Circuit Court.

In the present case the date of the decree in the District Court was December 26, 1877. At the foot of the decree, and as part of it, is the following:

"And thereupon said Bliss O. Wilcox, claimant of said schooner S. S. Osborne, gave due notice of his intention to appeal this cause to the next Circuit Court, which said appeal is allowed, and bond therefor is fixed at eight thousand dollars. And it is further ordered that the time within which said appeal shall be perfected shall be extended for the period of twenty days from this date."

It does not appear that any formal appeal in writing was ever filed with the clerk of the District Court, but, within the time fixed, bond for an appeal was given and duly accepted. The record was not filed in the Circuit Court, neither was the cause docketed there until February 27, 1878. This was during the term of the Circuit Court which began on the 15th of January, and which was the term next held after the decree in the District Court. With the record there was filed in the Circuit Court an appeal in writing, such as the rule required. On the 11th of March the Winslows moved the Circuit Court to dismiss the suit because no appeal in writing had been made, as the rules of the District Court required, and also because the suit had not been docketed in the Circuit Court in time. This motion was denied. The ruling of the Circuit Court to that effect is now assigned for error by the Winslows.

An appeal in admiralty from the District to the Circuit Court must be to the term of the Circuit Court held next after the decree, and it must be made while the District Court is sitting, or within the time required by the general rules or a special order. These requirements are jurisdictional. They are pre-

scribed either by the act of Congress or by the rules of this court, promulgated under the authority of an act of Congress and having the force of law. All except this is mere procedure in either the District or Circuit Court. The rule of the District Court, requiring an appeal to be in writing and filed with the clerk, could certainly be dispensed with by that court. It simply prescribed a mode of proceeding to get an appeal, and while it continued in force the court might properly refuse to allow an appeal or accept security until what was required had been done But if the District Court allows an appeal without the writing, the appellee cannot object to the jurisdiction of the Circuit Court on that account. Here it distinctly appears that Wilcox claimed his appeal while the court was sitting, and that his claim was formally allowed by the court. In this way any further appeal in writing was dispensed with; and when afterwards the bond was given and accepted, the appeal was as clearly perfected as it would have been if a writing, such as the rule required, had been filed with the clerk. From that time the jurisdiction of the Circuit Court attached, and could not be taken away by any act or requirement of the District Court.

The provision in the rule of the District Court that the clerk should prepare and deliver to the Circuit Court the appeal and record in twenty days cannot prevent the Circuit Court from entertaining the cause if for any reason this is not done. The appeal, when once made, continues during the whole of the next term of the Circuit Court, unless sooner dismissed by that court for want of prosecution or otherwise, in accordance with its own practice. It follows that, so far as the appeal of the Winslows is concerned, the decree must be affirmed.

When the decree of the Circuit Court was rendered, both the Winslows and Wilcox appealed to this court. The Winslows filed the transcript and docketed their appeal here on the 19th of September, 1879; but Wilcox neither entered his appearance as an appellant in this court, nor did anything to make himself an actor in reference to his own appeal, until March

23, 1882, the day before the cause was called for hearing. Under these circumstances we must decline to consider his appeal. (Grigsby *v.* Purcell, 99 U. S., 505.) Rule 9 of this court requires every plaintiff in error or appellant, on docketing his cause, to have the appearance of counsel entered; and Rule 10, that he secure the costs. Cross-appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered and giving the security required by the rules. Otherwise, if he is here as appellee on the appeal of his adversary, he will be heard only in support of the decree as it was entered below. If he asks affirmative relief beyond what he got below, he must enter himself in this court in due time as the prosecutor of his own appeal, even though his adversary has docketed the case against him.

The decree is affirmed, and the appeal of Wilcox dismissed for want of prosecution.

DECREE AFFIRMED: CROSS-APPEAL DISMISSED

J. H. WADE v. THE TOWN OF WALNUT.

April 3, 1882.

A decision of the court of last resort in a State as to when a certain section of the State Constitution, relating to municipal subscriptions to railroads or private corporations, took effect, which had been assumed as correct in several decisions of this court, followed by this court.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

George A. Sanders and *Thomas S. Mc Clelland*, for plaintiff in error.

W. C. Goudy and *Allan C. Story*, for defendant in error.

Opinion of the court.

WAITE, C. J.—The only question we have to decide in this case is whether the section of the Illinois Constitution, adopted in 1870, relating to "municipal subscriptions to railroads or private corporations," was in force on the 6th of August, 1870. This question came before the Supreme Court of the State at the January Term, 1872, only eighteen months after the Constitution was adopted, in the case of Schall *v.* Bowman, 62 Ill., 321, and it was then decided that this section took effect on the 2d of July, the day the people voted for its adoption. The opinion in the case was written by Mr. Justice Breese, two justices dissenting. At the September Term, in the same year, the same questions came again before the court in Richards *v.* Danagho, 66 Ill., 74, and the opinion was then delivered by Mr. Justice Thornton, in the following words: "The only question presented by this record was, after mature deliberation, settled by the opinion in Schall *v.* Bowman. * * * Notwithstanding the able and plausible argument made in this case, the majority of the court adhere to the opinion in the case referred to above." Afterwards, at the January Term, 1878, in Wright *v.* Bishop, 88 Ill., 304, the court said: "Appellants make a very able and interesting argument against the rulings in those cases, but we are not convinced they should be overruled."

This court has never until now been called on to decide the question, but in numerous cases it has assumed that the section took effect on the day fixed by the Supreme Court of the State. (Town of Concord *v.* Portsmouth Savings Bank, 92 U. S., 625; County of Moultrie *v.* Rockingham Ten-cent Savings Bank, Id., 631; County of Randolph *v.* Post, 93 U. S., 502; Fairfield *v.* Gallatin County, 100 U. S., 51; Walnut *v.* Wade, 103 U. S., 683, and town of Louisville *v.* Portsmouth Savings Bank, at the present term.) Under these circumstances, we are not inclined to consider the question an open one here while the Supreme Court of the State adheres to its present rulings.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

THE CECIL NATIONAL BANK OF PORT DEPOSIT, MARYLAND, AND JACOB TOME v. THE WATSONTOWN BANK.

April 13, 1882.

A State statute regulating banks provides that their stock shall be transferable on the books of the corporation only, as regulated by by-laws, but that stockholders indebted to the bank should not transfer their stock without paying or securing the debt. A firm transferred to a party, as collateral security for a loan, certain shares of a State bank, who sent the certificate to the cashier and requested a new certificate, and received in reply a letter agreeing to transfer the stock in a short time, it being the custom of the cashier to attend to the stock transfers without consulting with the directors, and the cashier credited him with the stock on the bank books. The cashier was a member of the firm assigning the stock. The firm failed, heavily indebted to the bank, which then refused to transfer the stock. On suit in equity to compel it, *held:*

1. That the bank, by the act of its cashier, which was binding on it under the circumstances, had waived its lien on the stock, though originally entitled to it;

2. That the title to the stock passed independent of the certificate, which is mere evidence of title, when the bank credited the holder with it on its books, and that the bank thereby irrevocably consented to trust him just as if he were an original subscriber to its stock;

3. That, by delaying the assertion of its claim till the party holding the stock had lost all chance of obtaining other security, and by leading him to suppose himself secure by its course of dealing with him, it was estopped from asserting any lien that it had.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

John A. J. Cresswell and *W. H. Armstrong*, for appellants.

R. P. Allen and *Oscar Foust*, for appellee.

MATTHEWS, J.—This is a bill in equity, filed by the appellants to compel the defendant below, the Watsontown Bank, a corporation of Pennsylvania, to issue a certificate for two hundred shares of its capital stock to the Cecil National Bank of Port Deposit, one of the complainants, to which the latter claims to be entitled.

These shares of stock belonged to Powell & Co., a partnership doing business at Williamsport, Pennsylvania, as private bankers, the certificate whereof, then held by them, they assigned and delivered to Jacob Tome, president of the Cecil National Bank, as collateral security for two promissory notes of five thousand dollars each, of which they were makers, discounted for them by that bank, and which it held at their maturity. One of the notes was dated December 4, 1875, at thirty days, the other December 20, 1875, at forty days, and each contained a stipulation authorizing the sale of the stock in case of default.

These notes becoming due and remaining unpaid, the Cecil National Bank, on January 31, 1876, by its president, J. Tome, transmitted the certificate of stock in a letter to R. B. Claxton, cashier of the Watsontown Bank, requesting a new certificate in his name and asking what the stock was worth. To this Claxton replied to Hopkins, cashier of the Cecil Bank, on February 1, 1876, acknowledging the receipt of the certificate, stating that a new board of directors had been elected the day before; that they would organize on February 7, when a president would be elected, and when, as he added, "I will forward your stock certificate. Mr. Pardee, our present president, is not here, and I have no signatures on the stock book." He continued: "I think I can find a purchaser for Mr. Tome's stock at from 100 to 102, and possibly more. If you will let me know exact figures I will endeavor to dispose of it promptly, if he so desires." On February 9 Tome answered, authorizing a sale, and directing the proceeds to be remitted to him; and wrote again on February 14, enclosing a power of attorney to sell and transfer the stock, and stating that it would not be necessary to forward a certificate to him. This letter was an answer to one from Claxton of February 11, asking for the power of attorney from Tome to transfer the stock, and stating that as he intended to sell, it was useless to forward his certificate. He added that he thought he had arranged for the disposition of $1,000 of the stock that day, and would be as

prompt as possible in placing the balance. The power of attorney sent by Tome was in the usual form, and authorized R. B. Claxton "to sell, transfer, and assign the two hundred shares of stock of the Watsontown Bank standing in my name in the books of said bank," &c.

In point of fact, on February 4 the account of Powell & Co. on the stock ledger of the Watsontown Bank was charged by Claxton, the cashier, with "ten thousand dollars to J. Tome;" and an account opened with J. Tome, on the same book, crediting him, of the same date, "by Powell & Co., "ten thousand dollars." On February 21 this account is debited with two items: "To Henry Scott, five thousand dollars," and "A. Scott, five thousand dollars;" and the same day Claxton, the cashier, remitted to Tome the proceeds of the sale of these twenty shares of stock. On February 16 he had written, acknowledging the receipt of the power of attorney previously requested. The accounts of Henry Scott and of Amos Scott, on the same ledger, are credited with the stock sold to them respectively.

It appears that this stock ledger was the only book kept by the Watsontown Bank showing the transfers of stock, except a book of certificates, the stubs of which showed to whom the corresponding certificate had been issued, and what certificate had been surrendered in lieu of it. The stock ledger was kept by the cashier.

Martin Powell, one of the firm of Powell & Co., was a director of the Watsontown Bank, and R. B. Claxton, jr., its cashier, was also a member of that firm, and known to be such by the directors of the bank. It was his usual practice, as cashier, to make and keep the account of transfers of stock without consulting in each case with the board of directors.

On March 12, 1876, Powell & Co. failed, and April 13, 1876, made a voluntary assignment for the benefit of creditors.

On the next day, April 14, the Watsontown Bank, by its attorney, addressed a letter to J. Tome, as follows:

Opinion of the court.

"WATSONTOWN, PA., *April* 14, 1876.

"MY DEAR SIR: Some time since you sent to our bank a certificate of stock originally issued to Powell & Co., and by them transferred to you for $10,000. This transfer was never approved by our president or board of directors, and we will not do so, or cannot, under the act of assembly regulating banks in this commonwealth, so long as Powell & Co. are indebted to us, either as drawer, maker, or indorser, for matters due and unpaid. And, as this is the existing state of facts, we cannot permit a transfer to be made until we are secured to the satisfaction of our board of directors for all their (Powell & Co's.) liabilities."

The statutory provision referred to is section 10, article 10, of an act regulating banks, approved April 10, 1850, and reads as follows:

"The stock of the bank shall be assignable and transferable on the books of the corporation only, and in the presence of the president or cashier, in such manner as the by-laws shall ordain, but no stockholder indebted to the bank for a debt actually due and unpaid shall be authorized to make a transfer or receive a dividend until such debt is discharged or security to the satisfaction of the directors given for the same."

No by-law on the subject is shown to have been passed by the directors of the Watsontown Bank.

It is assumed that the account between the bank and Powell & Co. shows that the latter was indebted to the former on February 1, 1876, for a balance amounting to $5,215.67.

The Circuit Court rendered a decree denying the relief as prayed for, and requiring the bank to transfer one hundred and eighty shares of the stock, being the original amount less the twenty shares sold to the Scotts, only upon payment of the sum found due to it from Powell & Co., with interest.

The complainants bring the present appeal to review this decree.

As between Powell & Co. and Tome, representing the appellants, the property in the shares of stock, undoubtedly,

passed to the latter without the formality of a transfer on the books of the Watsontown Bank. As collateral security for the payment of their notes, discounted and held by the Cecil National Bank, and with the power to sell for the purpose of payment, the title passed by the delivery of the certificate, with the accompanying power of attorney. (Johnston *v.* Laflin, 103 U. S., 804.)

The title, however, was unquestionably subject to the lien given by its charter to the Watsontown Bank. That provision, when insisted on and enforced, would be effectual to subject the beneficial interest in the stock to the payment of any indebtedness from the stockholder making the transfer, to the bank for a debt which, at the time of the proposed transfer, was actually due and unpaid.

According to the terms of this provision, the bank was properly represented, in the act of transfer, by its cashier; and he was authorized to bind the bank, in consummating the transaction, by virtue of his office, in the absence of any by-law, according to the usage of the business and the practice of the particular bank, presumed to be known to and approved by the directors. (Case *v.* Bank, 100 U. S.)

The clause which denies to the stockholder the privilege of making a transfer of his stock, while a debtor, until his debt is discharged or secured to the satisfaction of the directors, does not forbid the bank to waive its rights, or prevent the cashier from acting for the directors, by virtue of an express or implied authority. In this, as in other matters of ordinary business, within the general scope of his official duty, he is their appropriative representative. There is no circumstance which, in our opinion, limits the general and usual authority of the cashier in respect to the transfer of the stock in question. The fact that he was a member of the firm of Powell & Co., whose stock it had been, can have no such effect; for his relation to the parties was well known to the directors of the bank, and he had no interest in the transaction adverse to his official duty. Whether the stock should become the prop-

erty of the Cecil National Bank, free from the claim of the appellees, or should remain subject to the claim of the latter, was equally indifferent to him, as in either event it served to pay an equivalent amount of debt for which he was liable. It is not alleged, and is not shown, that the appellants were aware of Claxton's relation to the firm of Powell & Co., or of their indebtedness to the bank whose officers they were, and there is no ground for imputing fraud to, or suspecting collusion with, them.

Our conclusion, therefore, is, as to this point, that the Watsontown Bank was lawfully represented by Claxton, its cashier, in this transaction, and is effectually bound by his acts. It remains to consider what was the nature and effect of what was in fact done.

A complete transfer of the title to the stock upon the books of the bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the bank. The consent of the bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. The transfer, when thus consummated, destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations. This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it. All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment, or by derivation from others, is quite suitable, and fully meets the requirements of the law. Accordingly, when the cashier of the

Watsontown bank received from Tome the certificate, with the authority for its transfer to him duly executed by Powell & Co., and, in pursuance of the request to make the transfer, charged it in the account against the former owner, and gave to Tome the corresponding credit, the latter became a stockholder in the bank, invested with the legal title to the stock, and with all the rights, powers, and privileges belonging to that character. Nothing more remained to be done to make the conveyance of title complete and absolute, and, so far as the bank was concerned, it was irrevocable. It had consented to the transfer, and the transfer had been made. Thenceforward the rights of Tome in respect to the stock in question were all they could have been if it had belonged to him by virtue of an original subscription. The claim of the bank upon it, based upon the existing relation with the former owner, ceased when, with its consent and through its act, that relation ceased.

The Cecil National Bank, then, had become the owner of the legal title to the stock which Powell & Co. transferred, and was entitled to demand recognition from the bank of its rights as a stockholder, and to the customary certificate as evidence of its ownership.

On the supposition that not the legal title, but only an equity based on an executory contract for transfer, passed to the appellants by virtue of the transaction with the cashier of the Watsontown bank, their right to the relief prayed for is not less clear. Aside from the recognition of the title as complete, by accepting and acting upon the power of attorney given by Tome to sell and transfer it as his stock, and the sales made to the Scotts under it, whose title is not denied, and yet cannot be better than that of their vendor, which is disputed, the subsequent conduct of the Watsontown bank raises an equity against it which is superior to its legal right to insist upon a lien on account of the debt of Powell & Co. When Tome made his claim on behalf of the Cecil National Bank for a transfer of the stock, if the appellee had intended to

insist on its legal right and assert its lien, then was the proper time to do it; for it then, at least, had notice of the interest and the claim of the appellants. If it had done so promptly, the latter might still have had an opportunity to obtain other security, or to enforce by other means their claims against their debtors, who, although in default, do not appear to have been as yet *in extremis*. So far, however, from adopting this course, the Watsontown bank pursued one exactly the reverse. It permitted the parties, by its actual exercise, to rest in the belief that their right to dispose of the stock for the purpose of paying the debt due them would not be questioned, until the failure and assignment of Powell & Co. made any other resort useless; and, having induced them to alter their condition by reliance upon assurances which were equivalent to a declaration that it had no adverse claim, the appellee cannot now be permitted to assert a lien, lost by its own laches, and the enforcement of which would operate as a fraud.

For these reasons, we conclude that the appellants are entitled to the relief sought by their bill, and that the decree, so far as it denies it, should be reversed. It is accordingly so ordered, and the cause is remanded, with instructions to modify the decree in accordance with this opinion.

REVERSED.

EX PARTE WILLIAM P. SLAYTON, ADMINISTRATOR OF MONTGOMERY CROSSMAN.

April 3, 1882.

1. Notwithstanding Admiralty Rules Nos. 54–57, the owner of a vessel may institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability provided by sections 4284 and 4285 of the Revised Statutes of the United States, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises.
2. A District Court in Admiralty at the port whither the vessel when lost was bound, which had appointed a trustee, to whom the owner conveyed all his interest in the remnants of the vessel and paid the

freight-money, thereby acquires jurisdiction to entertain the proceeding for limitation of liability, even though the wreck may not be in the district.

3. The District Court, having acquired jurisdiction, has the right to decide what persons are entitled to share in the fund, and this court will not, on a writ of prohibition, indicate to it the parties to whom to distribute the fund.

PETITION for a writ of prohibition.

Alfred Russell, for petitioner.

A. T. Britton and *J. H. McGowan*, for respondent.

WAITE, C. J.—We are of opinion that, notwithstanding Admiralty Rules Nos. 54, 55, 56 and 57 of this court, the owner of a vessel may institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability provided for by sections 4284 and 4285 of the Revised Statutes, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises. As was said at this term, in Dyer *v.* National Steam Navigation Co., our rules were not intended to prevent an owner from availing himself of any other remedy or process which the law itself entitled him to adopt, but to aid him in bringing into concourse those having claims against him arising from the acts of the master or crew.

Section 4284 expressly allows the owner to institute appropriate proceedings in any court, that is to say, any court of competent jurisdiction, for the purpose of apportioning the sum for which he is liable among the proper parties. Section 4285 provides that it shall be deemed a sufficient compliance on the part of the owner with the requirements of the act if he shall transfer all his interest in the vessel and freight to a trustee, appointed by the court, for the persons who may prove to be legally entitled thereto. Any court, therefore, which gets actual possession of the things to be transferred, and about which the concourse of claimants is to be had, is a court of

competent jurisdiction to try the questions that will properly arise upon the apportionment to be made. Even though proceedings should be instituted by the owner before he or his vessel is sued, the courts will either follow our rules as far as practicable, or do something which is equivalent, to obtain jurisdiction of the things about which the litigation is to be had. No monition can properly issue, either under the operation of our rules or otherwise, until this jurisdiction of the thing has been in some way secured.

On looking into the return of the district judge in this case, we find that the proceedings were instituted by the owner of the steamer Alpena in the district where the port is situated, to which the steamer was bound at the time the loss occurred, on one of her regular trips between Grand Haven, Michigan, and Chicago, Illinois; that the steamer lies sunk in Lake Michigan; that some portions of the wreck were washed ashore in Michigan, between Grand Haven and Chicago; that on filing the petition an order was entered by the court appointing a trustee, such as was provided for in the statute, and requiring the owner to transfer to him all its right, title, and interest to whatever remained of the steamer, her tackle, apparel, and furniture, and the pending freight; that such a transfer was made, and freight admitted to be pending amounting to one hundred and ninety-six dollars, actually paid over, and that when this was done the monition issued. It is true the return does not expressly show that the remnants of the wreck, scattered on the shores of the lake, have actually been gathered together and brought within the Northern District of Illinois, but it is stated that the transfer has been made and the freight-money paid over. This is not denied. Such being the case, we cannot say the court (upon the showing here made) has not acquired jurisdiction of the thing about which the litigation arises, to-wit, the fund to be apportioned among the parties who may prove to be legally entitled thereto. It has the freight-money in its possession, and its trustee is in a condition to gather up the remnants of the vessel, if it has not already been

done. The jurisdiction of the court is not dependent at all on the amount, but on the rightful possession of that which is to be divided.

We cannot, on an application for a writ of prohibition, determine what shall be the effect of any judgment of the District Court while exercising its rightful jurisdiction, neither are we to determine in this form of proceeding what persons, or what classes of persons, are entitled to the fund in hand. All these are questions to be settled in some other way than by prohibiting the court from proceeding under the jurisdiction it has acquired by getting possession, in an appropriate manner, of that which, according to the claim of the owner, represents the extent of his liability or that of his vessel. Whether it does so or not, is to be settled between the parties when the case is tried. With the possession and control of the property the court has jurisdiction.

The petition is denied. DENIED.

B. S. RUSSELL v. JESSE P. FARLEY, RECEIVER OF THE ST. PAUL AND PACIFIC RAILROAD COMPANY.

April 3, 1882.

1. A court of equity has, as an inherent power independent of statute, the right to impose terms or require security for damages from the party applying for an injunction; and this power is inherent in the Federal Circuit Courts, as courts of chancery, independent of statute.
2. And having the power of imposing terms, it has also the power to mitigate them or relieve from them.
3. *It seems* that the chancery court which awarded the injunction has the inherent power, on deciding against the complainant, to proceed in the same suit to assess the damages arising from the injunction, and will not leave the parties to an action at law on the injunction bond.
4. The decision of the inferior court on the amount of damages sustained by an injunction suit is so much a matter of discretion that it will require a very clear case for this court to reverse it.

Opinion of the court.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

R. L. Ashhurst and *T. H. Hubbard*, for appellant.

Henry J. Horn, for appellee.

BRADLEY, J.—This case comes before us by appeal from a decree of the Circuit Court of the United States for the District of Minnesota, in a case in equity wherein Jesse P. Farley, as receiver of certain branch lines of the St. Paul and Pacific Railroad Company, and of all lands and other property appurtenant thereto, was complainant, and the firm of De Graff & Co., the Northern Pacific R. R. Co., the Lake Superior and Mississippi R. R. Co., B. S. Russell, G. W. Cass, receiver of the Northern Pacific R. R. Co., and C. W. Mead, general manager of said company, were defendants. The complainant was appointed receiver August 1, 1873, by the Circuit Court, in a foreclosure suit brought by John S. Kennedy and others, trustees under a mortgage given by the St. Paul and Pacific R. R. Co. to secure fifteen millions of dollars of bonds issued by a subsidiary corporation called the first division of the St. Paul and Pacific R. R. Co., which had a contract to build the railroad, and a lease of the road for ninety-nine years. Amongst the assets supposed by the receiver to be subject to this mortgage was certain railroad iron, which had been purchased in England with the money raised by the sale of the bonds, to wit, 1,700 tons lying at Glyndon, on the line of the road, and 1,000 tons at Duluth, claimed by De Graff & Co., and 1,860 tons at Duluth, claimed by B. S. Russell;—that at Duluth being mostly held in the custom-house for unpaid duties, but some of it being about to be reshipped. The bill in this case was filed by the receiver in the State District Court for the county of Ramsey on the 21st of June, 1875, seeking to set aside the respective transfers of iron by virtue of which De Graff & Co. and Russell claimed to hold

it, and for an injunction to restrain them from removing it, or taking it from the custom-house.

By a statute of Minnesota it is declared that "when no special provision is made by law as to security upon injunction, the court or judge allowing the writ shall require a bond on behalf of the party applying for such writ, in a sum not less than two hundred and fifty dollars, executed by him or some person for him, as principal, together with one or more sufficient sureties, to be approved by said court or judge, to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct." (2 Bissell's Statutes, 806, sec. 121.)

On filing the bill in this cause, the complainant (the said receiver) obtained a temporary injunction upon giving to the defendants a bond in the penalty of ten thousand dollars, with the following condition to wit: "Whereas the said plaintiff is about to apply to this court for a temporary injunction enjoining and restraining the defendants, and each of them, from shipping, removing, selling, hypothecating, transporting, interfering, or intermeddling with 4,560 tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof: Now, therefore, if the plaintiff will pay the parties enjoined by such writ, or detained thereby, such damages as they or either or any of them may sustain by reason of the writ, if the court finally decide that the party was not entitled thereto, the above obligation shall be void; else of full force and virtue."

De Graff & Co. having by consent rebonded one thousand tons of the iron claimed by them, the court on the 11th of August, 1875, required a further bond from the complainant in the sum of seventy-nine thousand dollars, the condition of which was as follows, to wit: "Whereas an injunction has heretofore been granted in this court enjoining and restraining the said defendants, and each of them, from shipping, re-

moving, selling, hypothecating, transferring, or interfering, or intermeddling with 4,500 tons of iron rails now lying at Glyndon and Duluth, Minnesota, or any part thereof; and whereas said injunction is still in force and effect except as to one thousand tons of said iron, claimed by said De Graff & Co., at Duluth, aforesaid; and whereas the said court has ordered, as a condition for the continuance of said injunction, that the plaintiff execute to the defendants herein a bond in the sum of seventy-nine thousand dollars, in addition to the bond for ten thousand dollars heretofore given by the plaintiff on the issuance of the injunction: Now, therefore, if the plaintiff will pay the parties enjoined by such injunction or detained thereby such damages as they, or either or any of them, may sustain by reason of such injunction, if the court finally decide that the party was not entitled thereto, the above obligation shall be void; else of full force and virtue."

The defendants severally answered the bill, and on the first of March, 1876, on application of the complainant, the cause was removed to the Circuit Court of the United States for the District of Minnesota. After taking a large amount of evidence, it was brought to a hearing, and on the 13th of October, 1877, a final decree was made dismissing the bill as to De Graff & Co., without cost to either party. As to the defendant Russell, who was charged with holding eighteen hundred and sixty tons of the iron, it appeared that he was acting as agent for William G. Morehead, who was trustee or agent for the First Division Company in procuring the iron and carrying on the work of construction, and who had sold to De Graff & Co., sub-contractors, the iron claimed by them, in part payment of moneys due them for work, and had pledged a portion of the eighteen hundred and sixty tons of iron (claimed by Russell) to pay Jay Cooke & Co. for advances of money, and Jay Cooke & Co. had pledged and sold it to the United States (the Navy Department) for a debt due to it. Some ten hundred and ninety tons of the eighteen hundred and sixty tons in question remained at Duluth unsold, and this was claimed by

Edward M. Lewis, trustee in bankruptcy of Morehead; but the court held that it was subject to the mortgage, and that the receiver was entitled to it. The decree on this part of the case was as follows, to wit:

"It is also further ordered, adjudged, and decreed that the said Farley, as receiver, as against the defendant B. S. Russell, and against the defendant Edward M. Lewis, trustee in bankruptcy of William G. Morehead and others, is entitled, for the benefit of the trust which he represents, to all the iron rails in controversy herein not sold to De Graff & Co., and not pledged and sold to the Navy Department; which said iron rails, subject to the customs duties to the United States, thus decreed to the said Farley as receiver, he is authorized to use in the construction of the said extention lines or to sell at the best prices and on the best terms practicable, and apply the net proceeds thereof to the credit of the mortgage dated April 1, 1871, executed by the St. Paul & Pacific Railroad Company to Horace Thomson, George L. Becker, and William G. Morehead, trustees, who in the said trust have been succeeded by the said Wetmore, Pearsal, and Denny as trustees, and which mortgage is now being foreclosed in this court, neither party as against the other to recover costs and damages. It is further adjudged and decreed that all transfers of the eighteen hundred and sixty tons of iron in controversy herein claimed by defendant Russell from William G. Morehead to said Russell, except transfers relating to the iron pledged to the Navy Department, are null and void, and that said Russell has no right, title, or interest therein as against the said Farley and said trustees. It is further ordered, adjudged, and decreed that said Farley has no right, title, or interest in the iron transferred to the Navy Department, and which is claimed herein by defendants Russell and Lewis; and it is further adjudged that neither the plaintiff nor the defendant Russell is entitled to costs or damages herein.

Russell alone appealed from this decree, and appealed only

from that portion of it which declared that neither party as against the other is entitled to costs or damages.

That an appeal does not lie from a decree in equity as to the costs merely, is well settled. (Canter *v.* Amer. Ins. Co., 3 Pet., 307; Elastic Fabrics Co. *v.* Smith, 100 U. S., 112.) But it is contended by the appellent that the Circuit Court had no power to decree that he was not entitled to damages, thereby precluding him from recovering damages on the injunction bond; and if it had any power to make a decree on the subject of damages, the decree denying him damages in this case is erroneous.

Had the cause remained in the State court, there can be no doubt that court, under the Minnesota statute which required an injunction bond to be given, could have determined the question of damages. The statute expressly declares that "the damages may be ascertained by a reference, or otherwise, as the court shall direct." But the Circuit Court of the United States is not governed in its practice in equity by the laws of the State in which it sits, but by the rules of practice prescribed by this court and by the Circuit Court not inconsistent therewith; and, when these are silent, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied. (Equity Rule 90.) The injunction bond taken by the State court, it is true, comes into the Circuit Court with the other proceedings in full force; but the power of the Circuit Court to deal with it depends upon the principles which govern the practice of that court, the same as if it had been originally taken by its direction.

The question then arises whether the circuit courts have any power to make a decree on the subject of damages arising from an injunction, where an injunction bond has been required. Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit

as it may deem equitable and just. Has it any such power, or any power over the subject, where such a bond has been given? For a solution of this question it will be proper to advert briefly to the history and object of this kind of obligation.

It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant if an injunction were granted, and by the complainant if it were refused. (Kerr on Injunctions, 209, 210.) And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases to grant or not to grant the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial. The older authorities refer to numerous instances in which it has been exercised. Chief Baron Gilbert, in his Forum Romanum, p. 196, (repeated in Bacon's Abridgment, title Injunction, C,) speaking of the course where an answer is put in denying the equity of the bill, followed by a rule *nisi* to dissolve the injunction, says: "The plaintiff must show cause, either upon the merits or upon filing of exceptions; if upon the merits, the court may put what terms they please upon him, as bringing in the money, or paying it to the party, subject to the order of the court, or giving judgment with a release of errors, and consenting to bring no writ of error, or to *give security* to abide the order on hearing, or the like." (See also Newland's Ch. Pract., 223, 224; Kerr on Injunctions, 212, 622; Story's Eq. Jurisp., sections 968*b*,

959*d*.) In the case of Marquis of Downshire *v.* Lady Sandys, (6 Ves., 107,) A. D. 1801, Lord Eldon said if there was a real doubt on the subject in controversy, he would direct an issue, "taking care that if in the result of such a direction the defendant should be prejudiced by not being permitted to cut in the meantime, [trees claimed to be ornamental,] the plaintiff should undertake to pay the value, if the decision should be against him." In a similar case, in 1825, the same judge made an order that the plaintiff should go before the master and give such security as would in the master's judgment secure to the defendants the value of all the trees which they should be prevented from cutting by the injunction, in case it should finally turn out in the judgment of the court that they ought not to have been enjoined in equity." (Wombwell *v.* Belasyse, 6 Ves., 110, note.)

Mr. Kerr, in his Treatise on Injunctions, says: "In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. The court may often, by imposing terms on the one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. * * * The defendant may be required to do such acts, or execute such works, or otherwise deal with the same as the court shall direct; or to enter into an undertaking to refrain from doing in the meantime the acts complained of by the bill, or to abide the order the court may make as to damages or otherwise, in the event of the legal right being determined in favor of the plaintiff. * * * So, on the other hand, as a condition of granting an injunction, [the court may] require the plaintiff to enter into an undertaking as to damages, in the event of the right at law being determined in favor of the defendant and the injunction proving to have been wrongly granted." (Kerr on Injunc.,

212.) Again, in another place, he says: "In doubtful cases, where damage may be occasioned to the defendant in the event of an injunction, or interim restraining order, proving to have been wrongly granted, the court will require the plaintiff, as a condition of its interference in his favor, to enter into an undertaking to abide by any order it may make as to damages." (Kerr, 622.) In Wilkins *v.* Aitkin, 17 Ves., 422, where a bill was filed to prevent the infringement of a copyright, but it being doubtful whether the defendant did more than make allowable extracts from the plaintiff's work, Lord Eldon said: "The proper course in this instance will be to permit this work to be sold in the meantime; the defendant undertaking to account according to the result of the action." (P. 426.)

The same practice has prevailed in this country, in some cases in pursuance of statute, and in others by the action of the court itself. As early as 1723 a law was passed in Maryland, that any person desiring to proceed in equity against a verdict or judgment rendered against him in the County Court should be required to give security in double the amount of the debt for the due prosecution of the injunction and payment of debt and all costs and damages that should accrue in the Chancery Court, or should be occasioned by the delay, unless the Court of Chancery should decree to the contrary, and in all things obey such orders and decree as the court should make. In 1793 an additional law was passed, to the effect that whenever application should be made for an injunction to stay proceedings at law, the chancellor should have power and discretion to require the applicant to give a bond to the plaintiff at law, with condition to perform such order or decree as the chancellor should finally pass in the cause.

Similar laws were passed in Virginia in 1787, and in New Jersey in 1799, and no doubt in other States at an early date. Their object was, where an adjudication had already been at law, to make it compulsory on the chancellor to require security before granting an injunction. The jealousy of the courts

of law at the interference of the Court of Chancery with their judgments is a matter of historical notoriety. But these laws did not interfere with the chancellor's discretionary power to require a bond in all other cases.

Regulations substantially similar to those above adverted to were prescribed by the general rule of the Court of Chancery of New York prior to the adoption of the Revised Statutes. In 1828 they were codified, with amendments, in that revision. But the rule, as well as the statute, only related to injunctions for staying proceedings at law.

In 1830 the Chancellor of New York, for the first time, made a general rule, (No. 31,) that where no special provision was made by law as to security, the *vice-chancellor*, or *master*, who allowed an injunction out of court should take from the complainant, or his agent, a bond to the party enjoined, either with or without sureties in the discretion of the officer, in such sum as might be deemed sufficient, not less than five hundred dollars, conditioned to pay such party all damages he might sustain by reason of such injunction if the court should decide that the complainant was not entitled to the same; and that the damages might be ascertained by a reference or otherwise, as the court should direct. (1 Hoffman's Chan. Prac., 80; 1 Barb., do., 622; 2 Paige's Rep., 122.) The object no doubt was to prevent hasty and oppressive injunctions from being issued by subordinate officers.

This rule, enlarged and made applicable to all courts and judges, was copied in the New York Code of Procedure of 1848, sec. 195, (now sec. 222,) and has been followed in other codes and systems of practice in other states. (See 2 R. S. Wisconsin, 748; also Laws of Illinois, Iowa, Colorado, &c.) It was substantially adopted in the Chancery Rules of New Jersey in 1853, except that it was left to the discretion of the officer to require a bond or not. It was copied in the statutes of Minnesota, under which the bonds in the present case were taken, as may be seen by comparing it with the section of said statutes already cited.

But no act of Congress, or rule of this court, has ever been passed or adopted on this subject. The courts of the United States, therefore, must still be governed in the matter by the general principles and usages of equity. To these we have already adverted so far as concerns the power to require security or impose terms before granting an injunction. It remains to notice the control which a Court of Chancery may exercise in relieving from or modifying such terms during the progress or at the termination of the cause, and of enforcing and carry out the conditions imposed or the undertakings entered into.

Since the discretion of imposing terms upon a party as a condition of granting or withholding an injunction is an inherent power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the power to mitigate the terms imposed, or to relieve from them altogether whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them. Besides, the power to impose a condition implies the power to relieve from it. If, for example, it is deemed proper upon an application for an injunction to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterward such as to make it manifestly unjust to retain the fund or document and deprive the owner of its use, the court assuredly has the power (though undoubtedly to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. Where the fund is security for a debt or a balance of account, or other money demand, this would rarely be allowable; but in many other cases it might not unfrequently occur that injustice would result from keeping property impounded in the court. On gen-

eral principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion rather than a furtherance of justice to deny to the court the power to supersede the stipulation imposed.

Against this view, however, the appellants have strenuously urged the case of Novello *v.* James, 5 DeGex, M. & G., 876, in which an injunction against the sale of certain compositions of Mendelssohn, in violation of a copyright, was obtained on an undertaking of the plaintiff to abide the order of the court as to damages. After a three years' litigation, the case was decided against the plaintiff. The legal title having been a doubtful one, the plaintiff moved that his bill might be dismissed without costs, and the defendant moved that the plaintiff might be decreed to pay him damages sustained by reason of the injunction. The vice-chancellor decided that the proper damages would be the costs of the suit. Upon appeal this order was reversed, upon the ground that the defendant, under the circumstance, had a right to insist on having his damages ascertained either by reference to an officer of the court or by a trial at law. The Lords Justices thought that it would be unjust to the defendant to disregard, or not to give effect to, the undertaking which was the price at which the plaintiff accepted the injunction; and that there was not sufficient evidence before the vice-chancellor to enable him to decide what the defendant's damages amounted to, or whether the costs, supposing him not otherwise entitled to them, were a just measure of the damages.

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It is evident from a careful reading of this case that the decision was based on the merits; and that the Lords Justices were of opinion that the defendant was entitled to damages; not as a matter of course, because an undertaking had been given, but as a matter of justice and equity which the undertaking would enable him to enforce. They held, therefore, that evidence of the damages should have been taken, and that the decree of the vice-chancellor was erroneous because made without any such evidence. We do not perceive that this case is at all adverse to the view which we have taken.

When the court sees no just cause for superseding or suspending the effect of an injunction bond or undertaking, it should be enforced in pursuance of its terms; and the party for whose benefit it was given will be entitled to an assessment of damages.

But then arises the question (not essential, however, to be decided in this case) how the damages should be assessed, and on this point different opinions have been entertained. Sometimes the form of the bond itself, or the order requiring it, or the statute or rule of court under which it is given, prescribes the mode of assessment, as, by a reference or otherwise, as the court shall direct. This is the ordinary course in England, and is that prescribed in Chancellor Walworth's order, which, as before stated, is followed in several State statutes, and, amongst others, in the statute of Minnesota. In such case no question can arise as to the authority of the Court of Chancery to cause the damages to be assessed under its own direction.

But where, as in the present case, no specific provision is made, either in the bond or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the parties enjoined may sustain by reason of the injunction, if the court finally decide that the party was not entitled thereto, as before stated, some difference of opinion exists as to the power of the Court of Chancery to assess the damages, and whether the only proper method is not an action at law on the bond. The appellants insist that the latter is the only

proper and legal course. In the case of Bien *v.* Heath, 12 How., 179, Chief Justice Taney made this remark: "A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction." In that case an injunction bond had been given to stay proceedings on an executory process in the Circuit Court for the District of Louisiana, and, in an action on the bond, that court had given judgment against the sureties, not merely for the damages arising from the delay caused by the injunction, but for the whole debt, interest and costs, in accordance with the law of Louisiana, where injunction bonds are binding to that extent, and where judgment is usually given against the sureties as parties to the cause on dismissing the injunction, similar to the proceeding against stipulators in admiralty. This court held that the Circuit Court sitting in equity could not take such a bond or give it such effect, and reversed the judgment. The remark that the bond must be prosecuted at law was a mere passing remark; it was so prosecuted in that case; but, from the great experience of the chief justice, it undoubtedly expressed the prevailing practice with regard to ordinary injunction bonds given under the Maryland statute in cases of injunctions to stay proceedings at law. Whether the remark can be understood as having a wider scope, is doubtful.

A decision on the point, however, was made by Mr. Justice Curtis, on the first circuit, in the case of Merrifield *v.* Jones, 2 Curtis's C. C. R., 306. That was a patent case in which an injunction had been issued, upon condition of entering into bond to pay the defendant any damages he might suffer by reason of the injunction, if finally determined not to be rightful. On dismissal of the bill, motion was made to refer to a master the question of damages. Justice Curtis denied the motion, holding that the party's remedy was an action at law;

but he only referred to the case of Bien *v.* Heath. The opinion is brief, and the question does not seem to have been very fully examined. The learned justice seemed to think that, inasmuch as the bond gave a legal action, the court, sitting in equity, had no jurisdiction over the question of damages.

Other cases are referred to by the counsel of the appellants to sustain their position; but, upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice and put an end to further litigation. We are inclined to think that the court has this power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages, (which is the usual formula in England), nor on the existence of an express law or rule of court (as adopted in some of the States) that the damages may be ascertained by reference or otherwise, as the court may direct—this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one or to deal with it after it has been taken. But while the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one.

In the present case, however, the court did not attempt to assess any damages which the defendants may have sustained

in consequence of the injunction and proceedings in the cause, but decreed that it was not a case for damages; in other words, that the bond ought not to be prosecuted. That damages were sustained is very probable. Such a litigation as this was could hardly fail to result in damage to all the parties engaged in it. But it is generally *damnum absque injuria*. The question before the court, or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered. Its decision was, that none ought to be recovered; or, in effect, that the bond ought not to be prosecuted. In view of what has already been said, we think that the court had power to decide this question.

But the appellants contend that, even if the court had the power to pass upon the question at all, its decision was erroneous, and ought to be reversed on the merits. On this point the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. The conduct of the parties and the course of litigation in the court below pass so directly under the inspection of that court, as to give it many advantages which no other court can possess for forming a correct decision on the question whether any extra damages should be allowed for the issuance of the injunction. Nevertheless, we have looked at the case with the view of ascertaining whether injustice has been done. And at the very threshhold of the inquiry we are met by the prominent fact that the injunction has never been entirely dissolved, and it has never been decided that the complainant was not entitled to it, at least for a portion of the iron claimed by the appellant. The latter strenuously defended the suit as to the whole; but it turns out, on the final hearing, that as to more than half of it, his claim is unsupported, and that the injunction was properly issued. A decree was made accordingly, from which no appeal has been taken. We must presume that it was equitable and just. This fact alone would make a *prima-facie* case for the decree in relation to damages. We have not

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been able to find anything in the record which leads us to think that it was erroneous or improper.

The decree of the Circuit Court is affirmed.

AFFIRMED.

THE KNICKERBOCKER LIFE INSURANCE COMPANY OF THE CITY OF NEW YORK v. BARTHOLOMEW FOLEY.

April 3, 1882.

1. An instruction that "where in a question whether the insured is of temperate habits at the time when he seeks to be insured, witnesses testify from their own knowledge of the party and his habits that he was not temperate, their testimony is entitled to greater weight than those who testify otherwise, because the latter have not seen or known of such habits as are testified to by the former," is improper, (*a*) because it assumes that there was a difference in the sources of knowledge of the witnesses, which is a fact not proved; (*b*) because in a question of such character it depends on their respective opportunities for judging whether the knowledge of the one is more to be trusted than the opinion of the other; (*c*) because it omits the consideration of the character of the witnesses.
2. A representation that a party is of temperate habits is not untrue if his habits in the usual every-day routine of his life are temperate, even though it is proved that he had had an attack of *delirium tremens*, for that may have resulted from a single debauch.

ERROR to the Circuit Court of the United States for the District of South Carolina.

In January, 1872, the plaintiff in the court below obtained from the Knickerbocker Life Insurance Company of the City of New York a policy of insurance for $5,000 on the life of one Badenhop, his debtor to that amount. The premium required at the time and the annual premiums stipulated were paid. The profits arising upon them entitled the assured, in May, 1873, to a further insurance on the life of his debtor, to the amount of $36.03; and in June, 1874, to the amount of $39.36; and policies for these sums were issued to him.

Badenhop died in January, 1875; but the assured, being

ignorant of the fact, paid the next annual premium. The present action is brought to recover the amount of the policies and of the premium overpaid, with interest. It was commenced in a court of the State, and upon application of the company was removed to the Circuit Court of the United States. The complaint alleges the issue of the policies, the interest in them of the plaintiff, the death of the debtor whose life was insured, the notice and proof thereof furnished to the company, the fulfillment by the plaintiff and the deceased of "all the conditions" of the policies, the amount due, and its non-payment. It also alleges the payment of the annual premium after the death of the insured. A copy of the policies is annexed to the complaint. The first policy declares that it is issued upon the express condition that the application on file in the office of the company is an express warranty of the truth of the answers and statements contained in it, and that, if they are in any respect untrue, the policy is to be void and of no effect to any one. The additional policies declare that they are subject to the same conditions as the first one.

In its answer the company admits the issue of the policies and the payment of the premiums mentioned, but sets up, among other things, as a defense, that the plaintiff and the insured did not make true and correct answers and statements to certain questions contained in the application for the first policy, in this: that to the questions "Is the party of temperate habits?—Has he always been so?" the answer given was "Yes," when, in fact, the insured was a man of intemperate habits, thus concealing by the answer his true habits, and making a false statement concerning them; whereby the policy became void.

On the point thus raised, whether the answers given as to the habits of the insured were true or false, the testimony offered was conflicting. On the part of the company, one witness testified that in 1871, and in the early part of 1872, he was the family physician of Badenhop; that at that time Badenhop was drinking hard; that during that year he had attended him

for *delirium tremens*, and once or twice for indisposition, produced, "as he thought," from the excessive use of intoxicating drink; and that he "regarded" him as a man of intemperate habits. But on his cross-examination, he admitted that he did not know Badenhop intimately, had no relations with him other than professional, and saw him only when he attended him professionally or met him occasionally in the street. Two other witnesses testified for the company: one, that he was intimate with Badenhop; the other, that he had known him for several years, and that he was a very intemperate man; that they had frequently seen him under the influence of liquor; but neither of them stated when his acquaintance commenced, whether before or after the policy was issued.

On the part of the plaintiff several witnesses were called who had known Badenhop intimately for many years, their acquaintance with him commencing before the policy was issued and continuing afterwards, and one of whom had been his partner in 1869 and 1870; and they all testified unqualifiedly to his being a man of temperate habits.

The defendant requested the court, among other things, to instruct the jury, "That where, in a question whether the party assured is one of temperate habits at the time when he seeks to be insured, and has always been so, witnesses testified, from their own knowledge of the party and his habits, that he was not of temperate habits, their testimony is entitled to greater consideration by a jury than witnesses who testify otherwise, because they have not seen or known of such habits as are testified to by those who declare that he was not a person of temperate habits."

This instruction the court refused to give, and an exception was taken. The court, among other things, instructed the jury that all the representations in the application for the policy of insurance are warranties that such representations are true, and that if they find from the evidence that the habits of the insured, at the time of or at any time prior to the application were not temperate, then the answers made by him to the questions

"Are you a man of temperate habits?"—"Have you always been so?" were untrue, and the policy is void; but that if they find that his habits in the usual, ordinary, and every-day routine of his life were temperate, then such representations were not untrue within the meaning of the policy, although they may find that he had an attack of *delirium tremens* resulting from an exceptional indulgence in drink prior to the issue of the policy; and that the burden of proof is upon the defendant to show the breach of any warranty in the policy. To the charge the defendant excepted. The jury found for the plaintiff, and upon its verdict judgment was entered; to review which the case is brought to this court on a writ of error.

A. G. Magrath, for plaintiff in error.

Bryan & Bryan, for defendant in error.

FIELD, J.—The instruction requested by the defendant, treating it as applicable to the case at bar and not as containing a mere abstract proposition of law, is open to several objections.

In the first place, it assumes that there was a difference in the sources of knowledge of the witnesses in the case; which was not the fact. All of them testified from their observation of the conduct of the deceased; and the jury would properly give weight to the testimony, not according to the positiveness of the averments of the witnesses as to their knowledge, but, other considerations being equal, according to their opportunities of observation of the deceased's conduct, and the manner in which those opportunities had been improved. No witness testified, from his own knowledge, that the deceased was of intemperate habits at the time he applied for the insurance, and that he had always been so. No instruction should be given which thus assumes as a matter of fact that which is not conceded or established by uncontradicted proof. (New Jersey Life Ins. Co. *v.* Baker, 94 U. S., 610.)

In the second place, the instruction requested does not present the law with entire accuracy. Whether the testimony of

the persons alleging knowledge is entitled to greater consideration than that of persons asserting opinions, mainly depends upon the subjects with respect to which the testimony is given. If the subject be, as in this case, the habits of a party, affirmations of knowledge will be weighed with reference to the opportunities of the witnesses to obtain the knowledge they assert. If they are not intimate with him, and see him only occasionally, the assertion of knowledge of his habits, however strong, will amount to no more than the assertion of an opinion, and will not be entitled to equal weight with less positive testimony of other witnesses founded upon a more extended acquaintance.

In the third place, the instruction requested omits the consideration of the character of the witnesses as an element in determining the weight to be given to their testimony. The force of testimony often depends as much upon the intelligence and judgment of the witnesses, disclosed by their manner of testifying, as upon confidence in their general veracity.

The charge given by the court, as stated above, correctly presented the law of the case. The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. Doctor Ray, in his Treatise on Medical Jurisprudence, says, that though it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those who are not habitually intemperate as well as in those who are. (Sec. 545.) In the American Encyclopædia, under the head of "Delirium Tremens," it is stated that it "sometimes makes its appearance in consequence of a single debauch;" though commonly it is the result of protracted or long-continued intemperance. (Vol. V, p. 782.)

When we speak of the habits of a person, we refer to his

customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured, "in the usual, ordinary, and everyday routine of his life, were temperate," the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirum tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testimony of the witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate.

Judgment affirmed. AFFIRMED.

ALFRED MARCHAND v. HENRY FRELLSEN.

April 3, 1882.

1. In a proceeding for an order of seizure and sale to foreclose a mortgage for the unpaid purchase-money of a plantation, in which the mortgagor appeals from the decision granting such order, a bond with security conditioned "that the appellant * * * shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of sale of his estate; * * * otherwise that the surety shall be bound in his stead," is a bond taken under articles 575 and 579 of the Louisiana Code of Practice; and the surety on such bond is liable for the debt whose enforcement is thus suspended, and not merely for damages from delay, costs, and interest.

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2. Where the subject-matter of the proceedings and the parties are before a court which is proceeding to foreclose a mortgage for default in the payment of some of the instalments, it has jurisdiction, even though at the time a suit is pending in another court on some former instalment; and its acts cannot be collaterally attacked.
3. The satisfaction of a decree on an appeal bond given in one court to suspend the collection of one instalment of the unpaid purchase-money is no satisfaction of an appeal bond given in another court to suspend the collection of another instalment.
4. The foreclosure of a mortgage and application of the proceeds of sale to the payment *pro rata* of the instalments, to suspend the enforcement of which the appeal bond was given, is not such an act of the creditor as discharges the surety under section 3061 of the Louisiana Code of 1870.

ERROR to the Circuit Court of the United States for the District of Louisiana.

On December 31, 1863, Henry Frellsen, the defendant in error, sold to one Daniel Fairex a plantation in St. Charles parish, in the State of Louisiana, for the consideration of one hundred and thirty-three thousand dollars, three thousand of which Fairex paid in cash, and the residue he agreed to pay in eleven annual instalments, bearing interest and falling due respectively on the first of May in every year for eleven years. He executed and delivered to Frellsen his promissory notes for the principal of these deferred payments, and also notes for the interest to accrue thereon. In the authentic act by which Frellsen conveyed the property to Fairex he reserved his vendor's privilege.

On May 19, 1869, Frellsen applied to the Seventh District Court of the parish of Orleans for an order of seizure and sale to be directed against the plantation sold by him to Fairex, to satisfy the two notes given for the instalment of the purchase-money which fell due on May 1, 1869, one for $11,000, principal money, and the other for $5,390, interest. The court directed the writ to issue as prayed for. The execution of the writ was suspended by an appeal taken by Fairex to the Supreme Court of the State. The bond for the appeal was in the penalty of $26,000, and the plaintiff in error, Alfred Mar-

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chand, was the surety. The condition of the bond was as follows: "Now, the condition of the above obligation is such that the above bound D. Fairex shall prosecute this appeal and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said Marchand, surety, shall be liable in his place." The Supreme Court affirmed the order of the Seventh District Court directing the writ of seizure and sale to issue, and gave judgment against Fairex for ten per cent. on the amount of the two notes which were the basis of the writ of seizure and sale on account of his frivolous appeal.

While the appeal just mentioned was pending in the Supreme Court of the State, the two notes, one for $11,000, principal, and the other for $4,620, interest, given by Fairex for the instalment of the purchase-money, maturing May 1, 1870, became due and were not paid. Thereupon Frellsen, on May 18, 1870, filed in the Fifth District Court for the parish of Orleans his petition for an order of seizure and sale, directed against the same plantation, to satisfy the two notes last mentioned. On the same day the court made the order as prayed for. On May 26, 1870, Fairex appealed to the State Supreme Court from this order also, and gave bond for the appeal in the penalty of $23,000. Marchand, the plaintiff in error, was surety on this bond also. It was conditioned precisely as the bond for the former appeal.

Fairex, the defendant, died on August 26, 1871, and the administratrix of his estate was made party to the appeal in the Supreme Court.

On January 19, 1874, the Supreme Court of the State made the following decree upon this appeal: "The court, therefore, orders that the plaintiff and appellee recover from the defendant five hundred dollars as damages for a frivolous appeal, and that the appeal be dismissed at the cost of the appellant."

While the appeal from the Fifth District Court was pending in the Supreme Court, that court having affirmed the order of

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seizure and sale made by the Seventh District Court, Frellsen, on November 28, 1871, applied to the last-named court for an alias order of seizure and sale to satisfy the two notes which matured May 1, 1869, the amount due on which was $16,390. The court directed the writ to issue, and by virtue of it the plantation was sold by the sheriff to Frellsen, the original vendor, for $40,000. This sum, by order of the court, was applied *pro rata* to all the notes for the purchase-money of the plantation remaining unpaid. After the notes which were the basis of the proceedings in the Fifth District Court were thus credited, there remained due thereon the sum of $8,595, and after the credit was applied to the notes which were proceeded on in the Seventh District Court, there remained due thereon the sum of $13,342.

On May 21, 1872, a rule was taken on Marchand in the Seventh District Court to hold him liable upon the bond for the appeal taken from that court. Judgment was demanded against him on the bond for the balance, $13,342, due on the notes which had been proceeded on in that court, and for $1,639, the judgment for damages for the frivolous appeal, rendered by the Supreme Court. Upon the trial of this rule the Seventh District Court entered judgment against Marchand for $1,639, the damages for the frivolous appeal, and for interest and costs, amounting to $1,900, and dismissed the rule as to the residue of Frellsen's demand. The sum of $1,900, which Marchand was condemned to pay, was paid by him on December 3, 1873, and accepted by Frellsen in full satisfaction of the judgment rendered as aforesaid.

After all these proceedings, on May 8, 1876, Frellsen took a rule upon Marchand in the Fifth District Court, in which it was alleged that there was due on the demand of Frellsen against Fairex, upon which Frellsen had obtained the order for seizure and sale in that court, the sum of $8,595, with interest at the rate of eight per cent. per annum from February 3, 1872; that the property of Fairex subject to executory judgment had been sold pursuant to an order and judgment of the Seventh District

Court, and that no other property of Fairex could be found by the sheriff to satisfy said demand; that Fairex was dead, and his estate insolvent; and requiring Marchand to show cause why he should not be condemned, by reason of his suretyship on the bond for the appeal from the order of seizure and sale made by that court, to pay said balance of $8,595, with interest, and $500, the damages adjudged by the Supreme Court for a frivolous appeal. This suit was removed by Marchand to the United States Circuit Court for the District of Louisiana.

Upon the hearing of this rule in the Circuit Court it was made absolute, and judgment was rendered against Marchand for $8,595, as due on the notes upon which the writ of seizure and sale had been ordered in the Fifth District Court, with interest thereon, and also for the sum of $500, the damages awarded against Fairex by the Supreme Court for his frivolous appeal.

This writ of error is prosecuted to review that judgment.

Durant & Hornor, for plaintiff in error.

P. Phillips, *W. Hallett Phillips*, *Sam. P. Blanc*, and *H. G. Morgan*, for defendant in error.

WOODS, J.—The first contention of the plaintiff in error is that the court below erred in the construction which it gave to the appeal bond executed by Marchand for the appeal taken by Fairex from the order of the Fifth District Court. He insists that the obligation assumed by Marchand when he executed this bond was to pay for the use and detention of the property pending the appeal, just damages for delay, costs of suit, and cost and interest on the appeal, and that he did not bind himself to pay the debt to satisfy which the writ of seizure and sale was ordered.

We find no warrant for this construction of the bond in the decisions of the Supreme Court of Louisiana, which interpret the articles of the code by virtue of which the bond was exacted.

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Bonds for appeal from an order directing a writ of seizure and sale are given by virtue of the provisions of articles 575 and 579 of the Louisiana Code of Practice. (Alley *v.* Hawthorn, 1 La. Ann., 132; Cottman *v.* Ratliff, 20 La. Ann., 179; State *ex rel.* Bankhead *v.* Judge, 22 La. Ann., 36.)

These articles are as follows:

"ART. 575. If the appeal has been taken within ten days, not including Sunday, after the judgment has been notified to the party cast in the suit, when such notice is required by law to be given, it shall stay execution and all other proceedings until definitive judgment be rendered on the appeal: provided the appellant gives his obligation, with good and solvent security residing within the jurisdiction of the court, in favor of the clerk of the court rendering the judgment, for a sum exceeding by one-half the amount for which the judgment was given, if the same be for a specific sum, as security for the payment of the amount of such judgment, in case the same is affirmed by the court to which the appeal is taken. * * *

"ART. 579. In the appeal bond it must be set forth in substance that it is given as security that the appellant shall prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise, that the surety shall be liable in his place."

It is evident from an inspection of the bond, which is the basis of this suit, that it was given under these articles.

The authentic act executed by both Frellsen and Fairex, which is set out in the record, whereby the former conveyed the plantation to the latter, and the latter agreed that the plantation should be subject to the vendor's lien for the payment of the notes given for the purchase-money, imported a confession of judgment in favor of Frellsen by Fairex for the amount of said notes respectively as they severally fell due. When, therefore, Fairex, the mortgagor, appealed from an order of the court directing a writ of seizure and sale to satisfy

such of the notes as were then due and unpaid, he suspended the execution of a judgment against him, and the surety on the appeal bond became bound for the debt. That such is the effect of the bond for appeal in cases of this class has been repeatedly decided by the Supreme Court of Louisiana.

In the case of Whann *v.* Irwin, 27 La. Ann., 706, that court said:

"It is contended that the proceeding against the surety was premature, as only the property mortgaged had been sold under the writ, and no execution had been issued against the judgment debtor and returned *nulla bona*. If this proposition be correct, to require a bond for an appeal from an order of seizure and sale is an idle form.

"Article 575 of the Code of Practice, and article 37 of the Revised Statutes of 1871, justify the mode of proceeding in this case. The only execution which it was possible for the judgment creditor to cause to be issued was issued and returned not satisfied. The requirements of the law were substantially complied with. The surety knew that under the executory process no other property could be sold except that which was included in the mortgage, and when he stopped that, by signing the appeal bond, he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.

"By reason of the nature of the judgment no execution could be taken out, after the return of the order of seizure and sale, which could reach the property of the debtor, and therefore the plaintiff had the right to proceed against the surety on the appeal bond. A different interpretation of the law would make of judicial suretyship a mere farce, the commencement rather than the end of litigation."

The rule thus laid down was reaffirmed in the case of Landry *v.* Victor, 30 La. Ann., 1041.

So in Thompson *v.* Grow, not reported, it was held that the surety on a bond given for a suspensive appeal from an order of seizure and sale is liable for the amount of the mortgage

claim sued on. (See Louque's Digest, title APPEAL, III, c. 4, page 39.) We have been able to find no conflicting decisions.

This interpretation of the local law and of the construction of bonds executed pursuant to its provisions is binding on this court, and leaves no ground for the contention of the plaintiff in error now under consideration to stand on.

It is next insisted by the plaintiff in error that all the proceedings in the Fifth District Court, in which the bond sued on in this case was given, were absolutely void, and therefore that the bond given for appeal in that case was also void.

The reason for this contention is stated to be that Frellsen having begun his proceedings for seizure and sale in the Seventh District Court on the notes which matured May 1, 1869, the institution of a similar proceeding on other notes of the same series, subsequently falling due, in the Fifth District Court, was an illegal and oppressive act. It is asserted that "all the proceedings in the Seventh District Court were regular and legal, whilst all those in the Fifth District Court were null and void on account of the error produced in the minds of the judges of the Supreme Court and Fifth District Court by the action of Frellsen in withholding from them knowledge of the pendency of the suit in the Seventh District Court."

It is not disputed that the subject-matter of the proceedings in the Fifth District Court was within the jurisdiction of that court and the parties were before it. Its proceedings, therefore, however erroneous, cannot be null and void. In passing upon this point it is only necessary to apply the rule laid down by this court as an axiom of the law, that the validity of a judgment cannot be questioned collaterally for errors which do not affect the jurisdiction of the court which rendered it. (Cooper *v.* Reynolds, 10 Wall., 308.)

The complaint of the defendant in error seems to be this: that in the proceeding in the Fifth District Court, Frellsen, on whose appeal bond he became surety, had a good defense against the order or judgment rendered in that case if he had only taken the trouble to make it. But the fact that he did

not make it, and that his antagonist did not make it for him, does not render the judgment void, the court having unquestioned jurisdiction to make orders for seizure and sale, and the mortgagor being present in court to resist it.

The plaintiff in error further insists that the payment by him on December 3, 1873, of the judgment for $1,900, rendered against him by the Seventh District Court upon the appeal bond given for the appeal from the order of that court, is also a satisfaction of any claim on the appeal bond signed by him in the Fifth District Court for the appeal from the order of that court allowing the writ of seizure and sale for the satisfaction of other notes of Fairex.

If, as decided by the Supreme Court of Louisiana, the appeal bond in such cases is a security for the payment of the notes on which the application for the order of seizure and sale is based, it is plain that the satisfaction of a bond for an appeal on one note cannot be a satisfaction of another bond for another appeal on a different note. Each note is a separate cause of action, and the satisfaction of one does not necessarily imply the satisfaction of another.

Lastly, plaintiff in error relies on article 3061 of the Code of 1870 for a reversal of the judgment below.

That article declares: "The security is discharged when, by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety."

The defense founded on this article is thus set forth in the answer filed by plaintiff in error to the rule taken on him in the Fifth District Court: "Said plaintiff has by his acts made it impossible and placed it beyond the power of respondent to satisfy the alleged order of seizure and sale herein, or the alleged decree on appeal therefrom; that said plaintiff, without respondent's consent, has, by his said acts, impaired respondent's rights to subrogation, and respondent is thereby released from any liability, if any existed, which is denied."

It is sufficient to say, in reply to this contention, that the

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mortgage to which the plaintiff in error claims the right of subrogation has been enforced, and the proceeds of the mortgaged property applied *pro rata* to the satisfaction of the claim for which he is surety. If he had been actually subrogated to the rights of Frellsen, under the mortgage, he could have secured nothing more. He has not been injured. He has lost nothing by the foreclosure of the mortgage. It has resulted to his advantage in the reduction of the debt for which he is surety, and is no ground for his discharge from the unpaid balance.

There is no error in the record. The judgment of the Circuit Court must therefore be affirmed.

AFFIRMED.

COTESWORTH P. HEAD AND WILLIAM HEAD v. JOSEPH P. HARGRAVE AND BENJAMIN MORGAN.

April 3, 1882.

1. A "statement" of the case, according to the law regulating civil proceedings in the Territory of Arizona, takes the place of a bill of exceptions when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken; and though prepared for and used on a motion for a new trial, it is available on appeal from the judgment, when, by stipulation of the parties, it is made a part of the record for that purpose.
2. In an action for legal services the opinions of attorneys as to their value are not to preclude the jury from exercising their "own knowledge and ideas" on the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of witnesses is not, as a matter of law, to be accepted by the jury in the place of their own.

ERROR to the Supreme Court of the Territory of Arizona.

This was an action brought in a District Court of Arizona to recover the sum of two thousand dollars, alleged to be owing by the defendants to the plaintiffs for professional services as

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attorneys and counsellors at law in that Territory in 1877 and 1878. The complaint alleges that the services were performed in several suits and proceedings, upon a retainer by the defendants; and that they were reasonably worth that sum. The answer is a general denial.

On the trial, one of the plaintiffs testified to the rendition of the services by them in several suits, stating generally the nature of each suit, the service performed, and its value. Five attorneys at law also testified to the value of the services, three of whom were called by the plaintiffs and two by the defendants. They differed widely in their opinions, the highest estimate placing the value of services at five thousand four hundred and forty dollars, the lowest at one thousand dollars.

The court instructed the jury, that in determining the value of the plaintiffs' services they might consider their nature, the length of time they necessarily occupied and the benefit derived from them by the defendants; that the plaintiffs were entitled to reasonable compensation for the services rendered; and that the reasonableness of the compensation was a fact to be determined from the evidence as any other controverted fact in the case; and then proceeded as follows:

"The services rendered were skilled and professional; and for the purpose of proving to you the value of that class of services rendered, professional gentlemen, attorneys at law, claiming to be familiar with the value of such services, have testified before you. If you accredit *these witnesses* with truthfulness, their testimony should have weight with you; and the fact as to what is a reasonable compensation should be determined from the evidence offered, and not from your own knowledge or ideas of the value of that class of services. In other words, you must determine the value of the services rendered from the evidence which has been offered before you, and not from your own knowledge or ideas of the value of such services."

The defendants thereupon asked the court to instruct the jury as follows

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"In determining the value of the plaintiffs' services the jury are not bound by the testimony of the expert witnesses; that testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable.

"In determining the value of the plaintiffs' services the jury are not bound by the opinions of the witnesses, unless the jury shall find from all the evidence, taken together, including the nature of the services, the time occupied in the performance of them, and the result of them, and the benefit derived by the defendants from the rendition of said services, that said opinions are correct."

The court refused to give these instructions, and an exception was taken. The jury thereupon gave a verdict for the plaintiffs for one thousand eight hundred dollars; upon which judgment was entered. A statement of the proceedings at the trial was then prepared, which, among other things, set forth the alleged errors of law excepted to by the defendants. This statement was used on a motion for a new trial, which was denied; and by stipulation it was embodied in the papers for the appeal to the Supreme Court of the Territory from the judgment, as well as from the order denying the new trial. The order and judgment were both affirmed, and, to review the judgment, the case is brought to this court.

C. J. Hillyer and *Thomas Fitch*, for plaintiffs in error.

P. Phillips and *W. Hallett Phillips*, for defendants in error.

FIELD, J.—The defendants in error object to the use of the statement, which sets forth the exceptions taken as not constituting a part of the record before us. The ground of the objection is, that the statement was prepared for and used on the motion for a new trial, with the disposition of which this court cannot interfere. The objection would be tenable but for the stipulation of the parties that the statement might be used on

appeal from the judgment. A statement of the case, according to the law regulating civil proceedings in the Territory, takes the place of a bill of exceptions when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is embodied in the record for that purpose, though used on the motion for a new trial. We have had occasion to refer to this subject in Kerr *v.* Clampitt, which arose in Utah, where a similar system of procedure in civil cases obtains, and it is unnecessary to repeat what is there said. (95 U. S., 188.)

The only question presented for our consideration is whether the opinions of the attorneys, as to the value of the professional services rendered, were to control the judgment of the jury so as to preclude them from exercising their "own knowledge or ideas" upon the value of such services. That the court intended to instruct the jury to that effect is, we think, clear. After informing them that in determining the value of the services they might consider their nature, the time they occupied, and the benefit derived from them, also that the plaintiffs were entitled to reasonable compensation for the services, and that the reasonableness of the compensation was a fact to be determined from the evidence, it proceeded to call special attention to the testimony of the attorneys, and told the jury that if they accredited *these* witnesses with truthfulness their testimony should have weight, and the fact as to what is reasonable compensation should be "determined from the evidence offered," and not from their own knowledge or ideas of the value of that class of services, and emphasized the instruction by repetition, as follows: "You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge or ideas as to the value of such services." This language qualifies the meaning of the previous part of the instruction. It is apparent from the context that by the words "evidence offered" and "evidence that has been offered before you" reference

was made to the expert testimony, and to that alone. Taken together, the charge amounts to this: that while the jury might consider the nature of the services and the time expended in their performance, their value—that is, what was reasonable compensation for them—was to be determined exclusively from the testimony of the professional witnesses. They were to be at liberty to compare and balance the conflicting estimates of the attorneys on that point, but not to exercise any judgment thereon by application of their own knowledge and experience to the proof made as to the character and extent of the services; that the opinions of the attorneys as to what was reasonable compensation was alone to be considered. That the defendants so understood the charge is evident from the qualifications of it which they desired to obtain; and the jury may, in like manner, have so understood it. And as we so construe it, we think the court erred, and that it should have been qualified by the instructions requested. Those instructions correctly presented the law of the case. It is true that no exception was taken to the charge, but its modification was immediately sought by the instructions requested, and to the refusal to give them an exception was taken. Objection to the charge was thus expressed as affirmatively and pointedly as if it had been directed in terms to the language used by the court.

It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of busi-

ness, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed, and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable.

As justly remarked by counsel, the present case is an excellent illustration of the error of confining the jury to a consideration merely of the opinions of experts. Of the five attorneys who were witnesses, no two agreed; and their estimates varied between the extremes of one thousand dollars and five thousand four hundred and forty dollars. Directing the jurors to determine the value of the professional services solely upon these varying opinions was to place them in a state of perplexing uncertainty. They should not have been instructed to accept the conclusions of the professional witnesses in place of their own, however much that testimony may have been entitled to consideration. The

judgment of witnesses as a matter of law is in no case to be substituted for that of the jurors. The instructions tended to mislead as to the weight to be given to the opinions of the attorneys, especially after qualifications of them designed to correct any misconception on this head were refused.

In Anthony *v.* Stinson a question similar to the one here presented came before the Supreme Court of Kansas, and a like decision was reached. The instruction given at the trial, that the testimony of certain lawyers as to the value of professional services should be the guide of the jury, and that they should be governed by it in finding the value of the services rendered, was held to be erroneous—the court observing that the jury were not to be instructed as to what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. (4 Kan., 212.)

In Patterson *v.* Boston, which arose in Massachusetts, the question was as to the damages to be awarded to the plaintiff for his property, taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact which bore upon the issue, he ought to disclose it and be sworn, and communicate it to his fellows in open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses. The case being taken to the Supreme Court of the State, it was held that these directions were not open to exception. Said Chief Justice Shaw, speaking for the court: "Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, which depends on knowledge and experience, if they might not avail themselves of those powers

of their minds when they are most necessary to the performance of their duties." (20 Park., 166.)

In Murdock *v.* Sumner the same court, speaking through the same distinguished judge, said that "the jury very properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry." In that case a witness had testified as to the quality, condition, and cost of certain goods, and given *his opinion* as to their worth, and the court said that "the jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value." (22 Seel., 158.)

In like manner, in this case the jurors might have taken the facts testified to by the attorneys as to the character, extent, and value of the professional services rendered, and then come to a different conclusion. The instructions given, whilst stating that the nature of the services rendered, the time occupied in their performance, and the benefit derived from them might be considered by the jury, directed them that they should be governed by the opinions of the experts as to the value of the services, and, in effect, forbade them to exercise their own knowledge and ideas on that kind of services. This error would have been avoided if the instructions requested by the defendants had been given.

It follows that the judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.

REVERSED.

THE WESTERN UNION TELEGRAPH COMPANY v. THE STATE OF TEXAS.

April 3, 1882.

1. A telegraph company is an instrument of commerce, and, if it accepts the provisions of the United States Revised Statutes in regard to telegraph companies, is a government agency.

2. A tax by a State of a certain amount for every message sent by a telegraph company is constitutional only as respects messages from one place to another within its own limits. Attempts to tax messages sent out of the State are void as being regulations of interstate commerce; and attempts to tax government messages are void as burdens on the constitutional agencies of the Federal government.

ERROR to the Supreme Court of the State of Texas.

Walton, Green & Hill, John F. Dillon, Wager Swayne, for plaintiff in error.

J. H. McLeare, Attorney-General of Texas, P. Phillips, and *W. Hallet Phillips,* for defendant in error.

WAITE, C. J.—The Western Union Telegraph Company is a New York corporation, engaged in the business of transmitting telegrams at fixed rates of compensation. Its lines extend into and through most of the States and Territories of the United States, and to Washington, in the District of Columbia. It has availed itself of the privileges and subjected itself to the obligations of title LXV of the Revised Statutes relating to telegraph companies, and its lines connect with those owned and established by the Government of the United States for public purposes. It has one hundred and twenty-five offices in the State of Texas, and is in close communication with other telegraph companies doing business in this country and abroad.

By the Constitution of Texas, article 8, section 1, the Legislature is authorized to "impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing business in the State;" and by article 4655 of the Revised Statutes, enacted under this provision of the Constitution, every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full-rate message sent, and one-half that for every message less than full rate. This tax is to be paid quarterly to the comptroller of the State on sworn statements made by an officer of the

company. In addition to this, taxes must be paid on the real and personal property of the company in the State.

Between October 1, 1879, and July 1, 1880, the company sent over its lines from its offices in Texas 169,076 full-rate and 100,408 less than full-rate messages. A large portion of these messages were sent to places outside of the State, and by the officers of the Government of the United States on public business. The company neglected to pay the tax imposed, and a suit was brought in one of the courts of the State for its recovery. In defense it was insisted that the law imposing the tax was in conflict with the Constitution and laws of the United States, and therefore void. The Supreme Court of the State, on appeal, sustained the law, and directed a judgment against the company for the full amount claimed, allowing no deductions for messages sent out of the State, or by government officers on government business. To reverse that judgment this writ of error has been brought.

In Pensacola Telegraph Company *v.* Western Union Telegraph Company, 96 U. S., 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege, those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-

General. Thus, as to government business, companies of this class become government agencies.

The Western Union Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States.

In the State Freight Tax Case, 15 Wall., 232, this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax "on each two thousand pounds of freight carried," without regard to the distance moved or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and interstate commerce. In this the court but applied the rule announced in Brown *v.* Maryland, 12 Wheat., 444, that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing, rather than on him who is charged with the duty of paying it into the treasury. In that case it was said a tax on the sale of an article imported only for sale was a tax on the article itself. To the same general effect are Welton *v.* Missouri, 91 U. S., 275; Cook *v.* Pennsylvania, 97 U. S., 566; Webber *v.* Virginia, 103 U. S., 344. And in the Passenger Cases, 7 How., 283, Crandall *v.* Nevada, 6 Wall., 35, and Henderson *v.* The Mayor, 92 U. S., 259, taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers. And in the State Tonnage Cases, 12 Wall., 204; Peete *v.* Morgan, 19

Wall., 581; Cannon *v.* New Orleans, 20 Wall., 577, and Inman Steamship Company *v.* Tinker, 94 U. S., 238, that taxes on vessels according to measurement, without any reference to value, were taxes on tonnage.

The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and therefore void. It was so decided in McCulloch *v.* Maryland, 4 Wheaton, 316, and has never been doubted since.

It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the

Statement of the case.

Government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax, is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review.

The judgment of the Supreme Court of Texas is reversed, and the cause remanded with instructions to reverse the judgment of the District Court and proceed thereafter as justice may require, but not inconsistent with this opinion.

REVERSED.

THE UNITED STATES v. BERNARD EMHOLT AND ELIZA BERGENER.

April 10, 1882.

1. At the hearing in the Circuit Court of an appeal from the District Court, the district judge who rendered the judgment appealed from cannot, under section 614 of the Revised Statutes, give a vote, even by consent of parties, when another judge is present; and the case cannot be brought to this court upon a certificate of division of opinion between him and the other judge.
2. An information for a forfeiture under the internal revenue laws cannot be brought from the Circuit Court to this court by appeal.

APPEAL from the Circuit Court of the United States for the Western District of Wisconsin.

This was an information filed in the District Court of the United States for the Western District of Wisconsin for the forfeiture of the right, title, and interest of Severin Schulte in certain real estate on which he carried on the business of a distiller, without having given bond as required by law, and with intent to deprive the United States of the tax on the spirits distilled by him.

In the District Court, held by Judge Bunn, Bernard Emholt and Eliza Bergener appeared and answered as claimants of the real estate under mortgages from Schulte; upon the

trial it was found by special verdict that Schulte was guilty as charged in the information, and that he held the legal title to the real estate subject to a mortgage to each of the claimants; judgment was given that the mortgages constituted no lien or incumbrance against the United States, and that all the real estate be forfeited; and the claimants appealed to the Circuit Court.

In the Circuit Court, held by Mr. Justice Harlan and Judge Bunn, the judgment was reversed; and a certificate, signed by Mr. Justice Harlan only, was entered of record, stating that the hearing upon the special verdict found in the District Court was, by consent of parties, had before the circuit justice and the district judge, and that they were divided in their opinion on the question whether, upon the facts found in the special verdict, the United States were entitled to judgment forfeiting the property described in the information to the use of the United States, except subject to the interest and claim of the claimants, as set out in their answers.

From the judgment of the Circuit Court the district attorney claimed and was allowed an appeal to this court.

S. F. Phillips, Solicitor-General, for appellants.

S. V. Pinney, J. F. Mills and *George C. Hazelton,* for appellees.

GRAY, J.—This court has no jurisdiction of the question certified. The office and object of a certificate of division of opinion are to bring to this court for determination a question of law upon which the opinions of two judges, competent to take part in the judgment of the Circuit Court, are opposed to each other. By the provisions of the judiciary acts of September 24, 1789, section 4, and April 29, 1802, section 5, reenacted in the Revised Statutes, section 614, upon the hearing in the Circuit Court of an appeal from a judgment of the District Court, the district judge who rendered the decision appealed from, although he may, for the information of the Cir-

cuit Court, assign his reasons for that decision, is prohibited from voting or taking part in the judgment of the Circuit Court, and that judgment is to be entered according to the opinion of the judge who is not so disqualified. The provision of the act of March 2, 1867, section 2, also incorporated in the same section of the Revised Statutes, which, in order to prevent failure or delay of justice, permits such a case, by consent of parties, to be heard and disposed of by the district judge when alone holding the Circuit Court, has no application when another judge is present. And the provisions of the acts of April 29, 1802, section 6, and June 1, 1872, section 1, embodied in sections 650, 652, 693, 697 of the Revised Statutes, do not enlarge the authority of the district judge in this respect. It necessarily follows that the case cannot be brought to this court upon a certificate of division of opinion between the judge who is qualified and the judge who is disqualified to take part in the judgment. (United States *v.* Lancaster, 5 Wheat., 434; Nelson *v.* Carland, 1 How., 265.)

The case cannot be treated as before this court on the appeal from the Circuit Court, without regard to the certificate of division, because it is on the common-law side of that court. If it is to be considered as a civil action, the proper mode of bringing it up is by writ of error, and not by appeal. (Bevins *v.* Ramsey, 11 How., 185; Jones *v.* La Vallette, 5 Wall., 519.) If, according to Clifton *v.* United States, 4 How., 242–250, it should be treated as in the nature of a criminal proceeding, it is hard to see how it could be brought to this court at all, except upon a certificate of division of opinion. (*Ex parte* Gordon, 1 Black, 503.)

Neither the consent of parties nor the allowance of the appeal in the court appealed from can enable this court to review the judgment of that court in any other form of proceeding than the law prescribes. (Kelsey *v.* Forsyth, 21 How., 85; Callan *v.* May, 2 Black, 541.)

This court having no jurisdiction of the case, the appeal must be dismissed and the case remanded to the Circuit Court.

DISMISSED.

HEWITT, NORTON & COMPANY v. A. J. PHELPS AND MARY B. PHELPS.

April 10, 1882.

1. A suit in chancery instituted in a State court and a decree of dismissal entered previous to the removal act of March 3, 1875, in which there was an appeal to the State Supreme Court, which reversed the decree and remanded the cause with leave to parties to amend the pleadings and to take testimony and to take an account, is a pending suit within the meaning of that act, and may be removed to the appropriate Federal court.
2. After such a decree of the State Supreme Court, the decree was not final nor conclusive, and the cause stood for a rehearing on the merits and not for the purpose of merely executing the judgment of the appellate court, and, therefore, in the meaning of the removal acts, the removal was "before the trial thereof."
3. A married woman grants an estate to a trustee upon trust for her sole and separate use, remainder to her children, and appoints her husband agent and co-trustee to manage the estate, providing that the trustee shall not be liable for his acts. The deed gives neither the trustee nor the husband a right to charge the trust estate for the expenses of running it. Parties who furnish supplies to the husband for the estate, alleging that they were used on the estate by the trustee after the husband's death, and that the trustee admitted a liability for them, and that the husband and trustee were both insolvent, and that the trustee would have had the right to charge the same against the estate in his accounts, attempt to enforce an equitable charge therefor against the estate: *Held*, That as neither the husband nor the trustee had the power to charge the estate, the creditors did not have any claim of subrogation nor any ground of enforcing against the estate the payment of their demand.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

William L. Nugent, for appellants.

E. Jeffords, *J. Z. George* and *Charles W. Clarke*, for appellees.

MATTHEWS, J.—The appellants, who were the complainants below, filed their bill in equity April 17, 1869, in the Chancery Court of Washington county, Mississippi, against the ap-

pellees and Jonathan Pearce, the object and prayer of which was to charge certain real estate in that State, which had been conveyed by Sarah Vick to Pearce upon certain trusts, and of which Mary B. Phelps was the sole beneficiary, with certain sums which the complainants allege they had advanced to the trustee, and for which they claimed the trust estate was liable.

The appellees were served with process; Pearce was brought in by publication. The cause having been put at issue, on final hearing in the Chancery Court, the bill was dismissed, November 7th, 1874, for want of equity. From this decree an appeal was taken, but not until March 30, 1876, when it was thus removed to the Supreme Court of the State. It was disposed of in that court May 21, 1877, by a decree reversing the decree of the court below, and remanding the cause, "with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views contained in the opinion" of the court, which is to be found reported under the name of Norton *v.* Phelps, 54 Miss. Rep., 467. On June 7, 1877, the mandate of the Supreme Court was filed in the Chancery Court of Washington county, and on the same day a petition for the removal of the cause to the Circuit Court of the United States for that district was presented by Phelps and his wife, on the ground that at the time of the commencement of the suit they were citizens of Kentucky, and had continued so to be at all times since—the plaintiffs during the same period being citizens of Louisiana—which was granted, bond given and approved, and transcript filed in the Circuit Court on August 4, 1877. On November 20, 1877, the appellants moved to remand the cause, which the Circuit Court refused to do. This ruling of the court is first assigned for error under the present appeal.

The contention of the appellants is that the Circuit Court had no jurisdiction to proceed with the cause, because, first, the suit was not pending at the time of the passage of the act of March 3, 1875, nor thereafter brought, and therefore not within the purview of that act; and second, because, at the

time the removal was effected, the trial of the cause in the State court had already taken place, or at least begun and was in progress, whereas the act requires that the petition for removal shall be filed before the trial thereof.

In our opinion neither of these positions is tenable. Whether, after final decree and before appeal is perfected, a purchaser of the subject of the suit is affected with the notice of *lis pendens* may be a question; although a distinction in this respect is made by some of the authorities between an appeal in equity and a writ of error, the latter being considered a new proceeding, not pending until service of citation, while the former is regarded as a step in the progress of the cause. But in contemplation of the act of March 3, 1875, there are and can be but two classes of suits: one, those pending at the time of its passage; the other, those thereafter brought. Of course a suit terminated has ceased to be a suit. Confessedly the present is a suit, and could not be said, at the time the act was passed, to have ended, although the decree was final in respect to the Court of Chancery which had rendered it, and would have become so between the parties if no appeal had been taken within the time limited by law. But until that period had elapsed it was still a *lis pendens*, in the sense that the party against whom the decree had been rendered had the right by an appeal further to prosecute it. It was not the beginning of a new suit; it was but one additional step in progress of an existing one.

The second ground of exception to the removal of the cause is maintained in argument upon the authority of Jifkins *v.* Sweetzer, 102 U. S., 177, but that case does not govern this. That decision turned upon the fact that the judgment of the Supreme Court of the State "disposed of the case finally upon its merits, and nothing remained to be done but to continue the hearing already begun until the necessary accounts could be taken and the details of a final decree settled." But here, although the Supreme Court of Mississippi passed in its opinion upon the merits of the case as disclosed by the record

then before it, nevertheless, in remanding the cause, "with leave to both parties to amend pleadings as they may be advised, and to take testimony," the whole matter was open and at large, as though the cause had never been at issue; and the clause providing "for an account to be taken in accordance with the views contained in the opinion rendered herein," must be understood as qualified by the previous part of the order, and as obligatory upon the Court of Chancery only as a declaration of general principles, to be applied as the facts should thereafter appear. It was not a judgment which operated as an estoppel between the parties. It was neither final nor conclusive. In point of fact, after the removal of the cause into the Circuit Court the parties availed themselves of the leave granted, and filed new and amended pleadings. The cause then stood in that court just as it would have stood in the State court but for the removal, *i. e.*, for a rehearing upon the merits, and not for the purpose of merely executing the judgment of the appellate court, as in the case of Duncan *v.* Gegan, 101 U. S., 810. Being properly removed, the parties are subject to that administration of law which is approved in the judicial tribunals of the United States whose jurisdiction is thus invoked, as was held in King *v.* Worthington, decided at the present term.

The Circuit Court having acquired jurisdiction, on final hearing, upon demurrer, dismissed the bill. We are now required by the appeal to review that decree.

The allegations upon which the alleged equity of the appellants is supposed to arise are in substance as follows:

On May 4, 1850, Sarah Vick and Henry W. Vick, her husband, executed and delivered to Jonathan Pearce a deed conveying to him all the property which Sarah Vick then owned as separate property, including a plantation, slaves, utensils, and stock in Washington county, Mississippi, the subject of the present suit, upon trust, nevertheless, for the sole and separate use of Sarah Vick during her life, and in remainder in fee for the use of her children living at the time of her death.

It was provided that the proceeds of the property in Washington and Issaquena counties, and such parts of it as might be sold, should be applied to the payment of a debt due to the Bank of the United States, after the payment of which the proceeds of the property, over what was necessary to support the plantation and family, were to be invested for the benefit of all her children living at the time of her death. It was also provided that Sarah Vick should retain possession of the property during her life, with power to sell or exchange any part, but any property received in exchange to be subject to the trusts; "provided further," the deed continued, "that said trustee is to permit the said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah Vick during her life, and as agent and trustee for her children after her death, to superintend, possess, manage, and control said property for the benefit of all concerned; said Henry Vick is to have power to sell and exchange said property after the death of said Sarah Vick, and apply the proceeds to the payment of the debt due to the trustee of the Bank of the United States; or, if the said debt is paid, the proceeds of the debt to be reinvested and be subject to the trusts of this deed." Provision is then made for applying a fund due to her from property in the hands of Col. Durden, held by him in trust for creditors of Col. Vick, to the payment of certain debts due from Henry W. Vick, but, it is added, "all the debts aforesaid to be paid by Col. Vick, if he is able to do so, and it is only in case he is not able that it is to be paid out of said fund: provided further, that said property is always to stand charged for the payment of such amount for the liberal support and maintenance of the said Henry W. Vick during his natural life." The concluding clause in the deed is as follows: "My intention is, that said Henry W. Vick shall be regarded, for the purposes of this deed, not merely as an agent, but also a co-trustee, and I desire he may be required to give no security for the performance of his duties, and the said Jonathan

Pearce is not in any manner to be responsible for the acts or conduct of said Henry W. Vick."

Henry W. Vick carried on the business of the plantation until he died, in 1861, when Pearce, as trustee, took possession of the trust property, Mrs. Vick, having previously died, leaving no issue surviving her, except Mary B. Phelps, wife of A. J. Phelps, the appellee.

The complainants, Hewitt, Norton & Co., were commission merchants in New Orleans, and claim a balance due to them from Pearce, as trustee, of $7,631.16, which they insist is a charge in equity upon the trust estate.

From statements of the account contained in the bill and amendments and exhibits, it appears that the whole of this balance resulted from transactions with H. W. Vick, while conducting the business of the plantation, prior to April 25, 1861. In a petition addressed by Pearce to the judge of the Probate Court of Washington county, November 28, 1865, and made an exhibit to the original bill, he states the transaction with Vick as resulting in a balance due complainants of $6,145.99, which, with $4,231.82 accruing from transactions with himself as trustee, make $10,377.81, which is the amount of the balance of the account as stated by the complainants as due them June 30, 1862. The subsequent credits were all received from Pearce, and reduced the balance October 3, 1866, to the amount claimed in the bill, being less than the amount due at the death of Vick, with interest added. This analysis of the account shows that the whole claim of the complainants is covered by their transactions with Vick, and is not embraced in those had with Pearce, all the debts incurred by the latter being cancelled by payments made by him. It is alleged, however, that the balance due at Vick's death was carried forward in account with Pearce as a charge against him, with his consent and approval; and that when he took possession of the trust estate he received and used for the benefit of the estate clothing, provisions, and other supplies which had been furnished or paid for by the complainants upon Vick's orders; and

it is charged in the bill "that all the items charged in your orator's said account for money loaned and supplies furnished were necessary and proper under the deed of Sarah Vick, and the said money and supplies were applied to the use and benefit of the trust estate; and upon a settlement of the accounts of the said Jonathan Pearce he would have had the right to charge the same against the said estate, and the balance due to him by said estate would have been, and would now be, equal in amount to the debt now claimed by your orators," &c. It is also alleged that Henry W. Vick at the date of the deed was a man of no means, property, or credit, and continued in the same condition until his death; and that Pearce when he took possession was in the same financial condition and a resident citizen of the State of Kentucky.

At the death of Mrs. Vick, her daughter, now Mrs. Phelps, was unmarried and a minor, and Jonathan Pearce became her guardian. On November 28, 1865, he filed his final account as guardian and trustee in the Probate Court of Washington county, showing a balance due to the estate from him of $2,939.40, and reporting, as heretofore stated, the account between himself, as trustee, and the appellants. His account as guardian was settled by an order of the court in January, 1866, and he received credit for an allowance by way of compensation for his services in excess of the balance due from him. It is charged in the complainant's bill that at this settlement Pearce admitted the balance to be due to the complainants as claimed, and that he surrendered the possession of the estate to Phelps and wife upon an understanding and agreement with them that it should be paid out of the cotton crop then growing on it.

It is manifest that the deed of trust from Mrs. Vick to Jonathan Pearce does not confer upon the trustee or upon Henry W. Vick any power to charge the estate directly with the payment of any sums of money for any purpose whatever, with the single exception of a personal support and maintenance for the latter. The grantor charges it with the payment of

certain specified obligations, and there is no evidence of an intention to permit it to be incumbered by the trustee or by Vick.

It is to be noted also that Jonathan Pearce is a trustee merely of the title, without any active duties in regard to the estate. The power to sell or exchange during his own lifetime the grantor reserves to herself, and after her death directs that it be exercised solely by her husband surviving her. All powers to superintend, possess, manage, and control the property are conferred exclusively upon Henry W. Vick "as agent for said trustee, and as agent and trustee for said Sarah Vick during her life, and as agent and trustee for her children after her death," but to be regarded, for the purposes of this deed, not merely as an agent, but also as a co-trustee. "And the said Jonathan Pearce is not in any manner to be responsible for the acts or conduct of the said Henry W. Vick." So that, while Pearce was trustee of the title merely, Vick was a co-trustee, having no title or estate in the property, but charged with all the active duties of management. After the death of Mrs. Vick, Pearce's sole duty in regard to the trust estate was to convey the title to the surviving children. By these provisions, the power of either to create a charge upon the trust estate seems to be effectually excluded.

It follows also from these provisions of the deed of trust, and the facts recited as to the origin and nature of the appellants' account, that no equitable charge against the estate can be established through the supposed liability of Pearce. It is quite plain that he was never personally answerable for the obligations created by Vick, and his alleged assumption of the account may be rejected as incompetent to create any such liability upon his part. Neither his admission nor that of the appellees could, in contemplation of law, create any charge upon the estate; and as trustee he could not establish it as necessary to his own exoneration.

The appellants, then, can reach the estate only, if at all, through their claim against Vick. For this purpose he may be regarded as an independent trustee, authorized to do what-

ever was necessary and proper in the performance of his duty to superintend and manage the trust property. He was undoubtedly personally bound for all his contracts made in that character. The question is, Does his insolvency create an equity in behalf of the appellants to reach the estate for the benefit of which the advances are admitted to have been made?

On this point the law prevailing in Mississippi and governing the case was well declared, we have no doubt, by the Supreme Court of that State in this very case. It said (54 Miss., 471): "In the case of Clopton *v.* Gholson, 53 Miss., 466, we announced the principles applicable to this case. These are that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But while this is the rule there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery."

The ground and reason for this rule is, that the trustee has an equity of his own for reimbursements for all the necessary expenses to which he has been put in the administration of his trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in the cases supposed of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee, upon a principle of equitable substitution or attachment, for his own security. It would not apply against the trust estate in this case for the enforcement of a debt created by Vick, for the reason that he had no title to the property; but adopting it and applying it

as though he had, it is equally plain that the appellants have established no right to the relief prayed for. What the state of the account may have been at the time of his death, between the trust estate and Henry W. Vick, does not appear. There is no allegation on the subject in the record. For aught that appears he may have had in his hands means enough belonging to the estate to satisfy all demands against it; he may, indeed, have been largely in debt to it. The case, in any of its aspects, clearly is not within the rule; and the effort to reach the estate through Pearce, instead of Vick, for the reasons already stated, must fail.

These are the grounds upon which the Circuit Court proceeded in the decree complained of. We find no error in the record, and the decree is accordingly affirmed.

AFFIRMED.

ALBERT SCHEFFER, GEORGE R. FINCH, AND CHARLES N. NELSON, EXECUTORS OF CHARLES SCHEFFER, DECEASED, v. THE WASHINGTON CITY, VIRGINIA MIDLAND AND GREAT SOUTHERN RAILROAD COMPANY.

April 10, 1882.

A party is injured in a railroad accident, his injury brings on insanity, and about eight months after this accident he commits suicide in a fit of insanity. Under a State statute, giving to the personal representative of the deceased a right of action for death caused by negligence or default, the accident is too remote a cause of the death to be actionable.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

John B. Sanborn, *Charles King* and *George A. King*, for plaintiffs in error.

Linden Kent, for defendant in error.

MILLER, J.—The plaintiffs in error, who are executors of Charles Scheffer, deceased, bring this action to recover of the

railroad company damages for the death of said Charles, which is alleged to have resulted from the negligence of the company while carrying the deceased on their road. The defendant demurred to the declaration, and the demurrer was sustained, and to reverse the judgment rendered on demurrer this writ of error is sued out.

The statute of Virginia, under which the action was brought, is, as to the question raised on the demurrer, identical with those of all the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the railroad company, by which a collision occurred between the train on which Scheffer was and another train, on the 7th day of December, 1874, proceeds as follows:

"Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the 7th day of December, A. D. 1874, to the 8th day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did; whereby and by means of the careless, unskillful, and negligent acts of the said defendant

aforesaid, the said Charles Scheffer, to wit, on the 8th day of August, 1875, lost his life and died, leaving him surviving a wife and children."

The Circuit Court sustained the demurrer, on the ground that the death of Scheffer was not due to the negligence of the railroad company in the judicial sense which made it liable under the statute; that the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent—his death by his own immediate act.

In this opinion we concur.

Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs in error, we think they both sustain the judgment of the Circuit Court.

The first of these is that of The Insurance Company *v.* Tweed, 7 Wall., 44.

In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane."

An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse—the one insured, situated across the street from Marshall warehouse—and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse; that if a new force or power had intervened, sufficient of itself to

stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse, but it rested on the ground that no other proximate cause was found.

In the case of The Milwaukee and St. Paul Railway Co. *v.* Kellogg, 94 U. S. R., 469, the sparks from a steam ferry-boat of the company had set fire to an elevator, and the sparks from the elevator had set fire to Kellogg's saw-mill and lumber-yard, which were from three to four hundred feet from the elevator. The court below was requested to charge the jury that the sparks from the steamboat as a cause of the fire of the mill and lumber was too remote.

Instead of this, the court submitted to the jury to find "whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

The Supreme Court affirmed this ruling, and in commenting on the difficulty of ascertaining in each case the line between the proximate and remote causes of a wrong for which a remedy is sought, says: "It is admitted that the rule is difficult; but it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." To the same effect is the language of the court in McDonald *v.* Snelling, 14 Allen, 294.

Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of

Syllabus.

Scheffer was his own act of self-destruction. It was, within the rule in both these cases, a new cause and a sufficient cause of death.

The argument is not sound which seeks to trace this immediate cause of the death, through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death.

Judgment affirmed.

AFFIRMED.

E. A. HITCHCOCK v. WILLIAM C. BUCHANAN AND JAMES C. WAUGH.

April 10, 1882.

1. A bill of exchange headed "Office of Belleville Nail Mill Co.," and concluding "charge same to account of Belleville Nail Mill Co., A. B., Pres't; C. D., Sec'y," is the bill of the company and not of the individual signers; and a declaration thereon against the latter as drawers, setting forth the instrument and alleging it to be their bill of exchange, is bad on demurrer.
2. A statute prohibiting defendants in actions upon written instruments from denying their signatures, except under plea verified by affidavit, does not apply to a case in which defendants demur because the instrument declared on appears upon its face to be the contract of their principal and not of themselves.

Statement of the case.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit by the plaintiff as indorsee against William C. Buchanan and James C. Waugh as drawers of the following bill of exchange:

"OFFICE OF BELLEVILLE NAIL MILL CO.,

"$5,477.13. BELLEVILLE, ILLINOIS, *December* 15, 1875.

"Four months after date, pay to the order of John Stevens, jr., cashier, fifty-four hundred and seventy-seven $\frac{13}{100}$ dollars, value received, and charge same to account of Belleville Nail Mill Co.

"WM. C. BUCHANAN, President.

"JAMES C. WAUGH, Secretary.

"To T. H. PIEPER, Treasurer, Belleville, Illinois."

The declaration alleged that the defendants, on the 15th of December, 1875, "at the office of the Belleville Nail Mill Co., Belleville, Illinois, made their certain bill of exchange," (describing it,) and, after it had been accepted by the drawee, delivered it to the payee therein named, and he indorsed it to the plaintiff; and the bill at maturity was presented for payment, and payment refused, and the bill protested for non-payment; and the defendants, knowing that it would not be paid by the acceptor, had omitted to provide funds for its payment. A copy of the instrument above set forth, and of the acceptance and indorsement thereon, was filed with the declaration.

The defendants, after oyer craved and had, severally filed general demurrers to the declaration, which were sustained by the Circuit Court, and judgment given for the defendants, on the ground that the instrument declared on was the bill of exchange of the Belleville Nail Mill Company, and not the bill of the defendants.

Thomas G. Allen, for plaintiff in error.

Charles W. Thomas, for defendants in error.

Syllabus.

GRAY, J.—The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Co., and not of the individuals by whose hands it is subscribed. It purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary. An instrument bearing on its face all these signs of being the contract of the principal cannot be held to bind the agents personally. (Sayre *v.* Nichols, 7 California, 535; Carpenter *v.* Farnsworth, 106 Mass., 561, and cases there cited.)

The allegation in the declaration that the defendants made "their" bill of exchange is inconsistent with the terms of the writing sued on and made part of the record, and is not admitted by the demurrer. (Dillon *v.* Barnard, 21 Wall., 430; Binz *v.* Tyler, 79 Illinois, 248.)

The provision of the statute of Illinois, (ed. 1877, title PRACTICE, secs. 34, 36,) prohibiting defendants sued on written instruments from denying their signatures, except under plea verified by affidavit, has no application where the fact of signature is admitted by demurrer and the only issue is one of law.

Judgment affirmed.

AFFIRMED.

CHARLES HAUSELT AND CHARLES KORN v. JEFFERSON HARRISON, ASSIGNEE IN BANKRUPTCY OF EDWARD BAYER.

April 10, 1882.

An agreement between a tanner and a leather merchant, by which the latter is to make certain advances for the purpose of enabling the former to tan certain skins and ship them to the merchant, and in which the skins, &c., before shipping, are pledged to the merchant as security, creates an equitable charge, which is good as between the parties, even without recording or a change of possession, and hence is good against the tanner's assignee in bankruptcy, who succeeds only to his rights; and therefore a subsequent agreement, *bona fide* made between the tanner and the merchant just before the filing of the petition in bank-

ruptcy by the former, and with knowledge of the bankruptcy, which puts the latter into possession in pursuance of the former agreement, is not a fraudulent preference under the bankrupt act.

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

Lewis Sanders, for plaintiff in error.

M. F. Elliott and *H. C. Parsons*, for defendant in error.

MATTHEWS, J.—This was an action of replevin brought in the Circuit Court, February 20, 1875, by the defendant in error to recover possession of certain tanned skins, part finished and part unfinished, and bark which, it is alleged, had been transferred by the bankrupt to the plaintiffs in error in fraud of the bankrupt law. There was a verdict and judgment for the plaintiff below, to reverse which this writ of error is prosecuted.

Edward Bayer, who was adjudicated a bankrupt January 18, 1875, upon his own petition, filed November 10, 1874, owned and was possessed of a tannery at Tioga, Pennsylvania, at which he had been conducting the business of a tanner; and Charles Hauselt, the plaintiff in error, was a leather merchant in New York.

On the day of its date, they entered into an agreement in writing as follows:

"Articles of agreement entered into this 29th day of May, 1874, between Edward Bayer, of Brooklyn, New York, party of the first part, and Charles Hauselt, of New York city, party of the second part, witnesseth:

"In consideration of certain moneys advanced, at the rate of seven per cent. per annum, to the party of the first part, for the purchase of veal and kip skins to be tanned, curried, and finished by one Charles Korn, the party of the first part hereby agrees to send all the skins so tanned, curried, and finished by the said Charles Korn—said skins to be labelled and stamped

with a label and stamp bearing the name of said Charles Korn, the skins to be in every way so finished as those now known in the New York market as the 'Korn skin'—exclusive to the party of the second part, he being sole agent for the so-called 'Korn skin' in the United States, in consideration of a commission of five per cent. of proceeds of all sales and a further one per cent. to cover fire insurance, storage, and labor; the said party of the second part agrees to sell all such skins to be sent him at the best market prices, the wholesale or cash price only to be taken as an average in account sales, small sales to be taken to own account at same price; the party of the second part further agrees to place all proceeds of sales of said skins, after deduction of aforementioned commission and advances for the purchase of veal and kip skins, at the disposal of the party of the first part, for his own use and benefit.

"And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security for the refunding, with interest, of all the moneys advanced by the party of the second part, and that all the skins shall be insured for their full value in good companies only.

"Signed, sealed, and delivered on the day and year above written. "EDW'D BAYER.

"CHARLES HAUSELT,

"Witness: "By E. HAUSELT, *Att'y.*

"FREDERICK E. SHEARER."

The business contemplated by this contract was carried on, according to its terms, until November 6, 1874. During that time Hauselt had made large cash advances and had received some tanned hides, but on that date was largely in advance in excess of receipts and in excess of the value of the property replevied. Bayer having become broken in health and financially embarrassed, informed Hauselt of his condition, and that, in consequence, he could proceed no further in the execution of the contract between them and could not otherwise repay his advances. Thereupon the parties entered into the following agreement:

"This agreement, made the 6th day of November, 1874, between Edward Bayer, of the city of Brooklyn, State of New York, party of the first part, and Charles Hauselt, of the city, county, and State of New York, party of the second part, witnesseth:

"That whereas an agreement was entered into by the parties hereto on the 29th day of May, 1874, whereby the party of the first part was, among other things, to tan, finish, and deliver to the party of the second part veal and kip skins purchased in the raw by moneys advanced by the party of the second part; and whereas the party of the first part has become ill and physically unable to complete the tanning and finishing the skins now on hand at the tannery of the party of the first part, and in order that said contract or agreement may be carried out, it is hereby agreed, and the party of the second part is hereby authorized, to take immediate possession and sole control of tannery, buildings, and out-houses connected therewith, of the party of the first part, in Tioga township, Pennsylvania, and run and use the same, together with such of the materials on hand as may be necessary to finish and complete said skins now on hand in said tannery, &c., and to take possession of and sell said skins in any State as may be to the best advantage of the parties hereto, all sales guaranteed by the parties of the second part, the net proceeds of all said sales to be passed to the credit of the party of the first part, after deducting advances and expenses of finishing said skins as per the terms of said agreement.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"EDW. BAYER. [SEAL.]
"CHARLES HAUSELT. [SEAL.]
"T. H. BRORMAN, *Att'y.*

"Signed, sealed, and delivered in the presence—
"C. H. SEYMOUR."

Hauselt immediately took possession of the tannery, holding

the property replevied at the time this action was brought, in pursuance of this arrangement.

It may be assumed that at the date of the second contract Hauselt had knowledge of Bayer's insolvency and of his intention immediately to file his petition in bankruptcy.

The court below charged the jury, in substance, as follows: That the property in the skins purchased by means of the advances under the contract of May 29, 1874, was in Bayer; that Hauselt had no right to the possession of them at any time while they were in the process of manufacture; that the only security given by the contract was the personal obligation of Bayer to consign them to Hauselt for sale when the manufacture was complete; that the contract of November 6, 1874, and the possession delivered and taken in pursuance of it, was a transfer to which Hauselt was not entitled, and constituted a preference within the meaning of the bankrupt law; that if it was made to make and obtain payment of the whole of the debt to Hauselt, Bayer being in fact insolvent, and Hauselt having reasonable cause to believe him to be so, the transaction was fraudulent and void, and the verdict should be for the plaintiff.

These charges were duly excepted to and are now assigned for error.

Notwithstanding the differences between the contract of May 29, 1874, between Bayer and Hauselt, and the contract considered by this court in the case of the Powder Company *v.* Burkhardt, 97 U. S., 110, it must be conceded that the legal title to the skins purchased with the money advanced by Hauselt vested in Bayer. But it was not an unqualified property. We cannot agree with the Circuit Court in the construction that the only security given to Hauselt by the contract was the personal promise of Bayer that he would perform it. To limit the contract to that extent is to deprive its last provision of all force; for, without it, the personal obligation to deliver the skins when tanned would still remain. The clause providing for security must be held to mean something; and it declares

that the skins themselves, before delivery of possession to Hauselt under the contract, for purposes of sale, shall be considered as security.

The legal effect of such a contract, it was decided in Gregory *v.* Morris, 96 U. S., 619, was to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice and creditors levying executions or attachments; and if followed by a delivery of possession, before the right of third persons have intervened, it is good absolutely.

Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt, and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement.

"Indeed," says Story, (Eq. Jur., sec. 1231,) "there is generally on difficulty in equity in establishing a lien not only on real estate, but on personal property or on money in the hands of a third person, whenever that is a matter of agreement, at least against the party himself and third persons who are volunteers or have notice. For it is a general principle in equity that, as against the party himself and any claiming under him voluntarily, or with notice, such an agreement raises a trust."

If, in consequence of his bankruptcy, the property had come into possession of his assignees, they would have taken it subject to all legal and equitable claims of others not in fraud of

the rights of general creditors. They would be affected by all the equities which could be urged against him. (Cook v Tullis, 18 Wall., 351.) In Yeatman v. Savings Institution, 95 U. S., 764, it was held to be an established rule that, "except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt." "He takes the property in the same plight and condition that the bankrupt held it." (Winsor v. McLennan, 2 Story, 492.) In Stewart v. Platt, 101 U. S., 739, it was held, that although the chattel mortgages involved in that litigation, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the parties. Mr. Justice Harlan, delivering the opinion of the court, said: "The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. * * * The latter, (the assignee,) representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee."

It follows that, Bayer becoming a bankrupt while in possession of the skins purchased, and in the tannery, under the contract of May 29, 1874, if his assignee in bankruptcy had taken possession of them, he would have done so subject to the terms of that contract, and Hauselt would have had the right to require either that he should perform the contract to its termination, so far as the skins then on hand were concerned, by fin-

ishing them and forwarding them for sale, or that he should surrender possession to Hauselt, under some arrangement mutually beneficial, whereby the enterprise might be wound up under his management, such as that actually made by Bayer, on November 6, 1874; or if the assignee sold the property in the condition in which he received it, that he should account to Hauselt specifically for the proceeds of the sale, and recognize him as a creditor for the remainder of his advances not thereby refunded.

Such being the mutual rights of the parties, the transaction of November 6, 1874, though made with knowledge of Bayer's insolvency, and in contemplation of his bankruptcy, if made in good faith, as it is admitted to have been, for the purpose of securing to Hauselt the benefits of the contract of May 29, 1874, was legitimate, and did not constitute, as was held by the Circuit Court, an unlawful preference in fraud of the bankrupt law. It is quite true that Hauselt could not have compelled Bayer, by an action at law, to deliver to him possession of his tannery and its contents, nor could he have recovered possession of the skins, tanned or untanned, by force of a legal title; but it is equally true that, in equity, he could, by injunction, have prevented Bayer from making any disposition of the property inconsistent with his obligations under the contract; and upon proof of his inability or unwillingness to complete the performance of his agreement, the court would not have hesitated, in the exercise of a familiar jurisdiction, to protect the interests of Hauselt, by placing the property in the custody of a receiver for preservation, with authority, if such a course seemed expedient, in its discretion, to finish the unfinished work, and ultimately, by a sale and distribution of its proceeds, to adjust the rights of the parties.

For these reasons, we think the court below erred in its charges to the jury. The judgment is therefore reversed, with instructions to grant a new trial; and it is so ordered.

REVERSED.

THE UNITED STATES *v.* FERDINAND E. CANDA AND A. D. HUTCHINS.

April 10, 1882.

United States *v.* Rosenburgh, 7 Wall., 580, and United States *v.* Avery, 13 Wall., 251, followed.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri.

S. F. Phillips, Solicitor-General, for plaintiffs in error.

No counsel appeared for defendants in error.

WAITE, C. J.—This case comes here on a certificate of division as to questions arising on a motion to quash an information, and must be dismissed for want of jurisdiction, on the authority of United States *v.* Rosenburgh, 7 Wall., 580, and United States *v.* Avery, 13 Wall., 251. It is consequently so ordered.

DISMISSED.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE CO., *v.* J. W. MASON.

April 10, 1882.

Hecht *v.* Boughton, *ante*, p. 301, followed.

ERROR to the Supreme Court of the Territory of Wyoming.

Homer Cook, for plaintiff in error.

E. W. Mann, for defendant in error.

WAITE, C. J.—This suit is dismissed on the authority of Hecht *v.* Boughton, No. 912, of this term, (*ante*, p. 301.) The remedy is by appeal instead of a writ of error.

DISMISSED.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE COMPANY, *v.* WILLIAM R. STEELE.

April 10, 1882.

Hecht *v.* Boughton, *ante*, p. 301, followed.

ERROR to the Supreme Court of the Territory of Wyoming.

Homer Cook, for plaintiff in error.

William R. Steele, pro se.

WAITE, C. J.—This suit is dismissed on the authority of Hecht *v.* Boughton, No. 912, of the present term, (*ante*, p. 301.) As there was no trial by jury, the case should have been brought here by appeal instead of a writ of error.

DISMISSED.

JAMES H. SIMMONS *v.* JOSEPH OGLE.

April 10, 1882.

1. The inference in favor of any claim of right to public lands against the United States growing out of mere possession is of but little weight.
2. The absence both of a patent and of a certificate of entry renders very weak a claim to public lands established merely by the application on file in the land office and the entry of the terms of sale, &c., on the books of the land office.
3. A prior claim to a piece of public land patented *held* on the facts not to be substantiated, especially against a patentee with a patent accompanied by possession.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

R. A. Halbert and *F. A. Mc Conaughty*, for appellant.

J. L. D. Morrison, for appellee.

MILLER, J.—Simmons, the appellant, recovered in the Circuit Court of the United States for the Southern District of

Illinois, on the 17th day of January, 1878, a judgment in an action of ejectment against Ogle, the appellee, for the possession of the south half of northeast quarter of section 3, township 1 north, of range 9 west, in St. Clair county, Illinois, and under the proper writ was placed in possession of it. The title on which he recovered was a patent to himself from the United States, dated June 12, 1874.

The defendant in that action, Ogle, thereupon instituted the present suit in chancery to compel a conveyance of the legal title thus established by Simmons to himself, on the ground that he had a superior equity, by reason of which the title in Simmons should be decreed to be held by him in trust for the benefit of Ogle. After answer, replication, and a full hearing on the evidence, the Circuit Court granted the prayer of the bill, and from that decree Simmons brings the present appeal.

There is much conflict in the testimony, and some parts of it are irreconcilable, and the result of it, in producing any very clear conviction of the true state of the case, is unsatisfactory, especially in regard to the foundation of the right of complainant to be the true equitable owner of the land.

The fact which he takes upon himself to establish is, that on December 30, 1835, one John Winstanley bought the land in question of the United States, at the land office in the town of Edwardsville, and paid for it. The subsequent conveyances and transfers from Winstanley to Ogle are not controverted; and if the purchase and payment now stated and alleged in the bill were satisfactorily established by the evidence, the decree of the Circuit Court in his favor should be affirmed.

The evidence by which this proposition is supported is of two classes:

1. The records of the Edwardsville land office, now found in the General Land Office of Washington, where they were removed by law.

2. The conveyances from Winstanley, and other proceedings by which, if Winstanley ever had any right, it became vested in Ogle, and the actual possession of the land by Ogle.

As regards the first of these, the records of the Edwardsville land office show a written application by Winstanley at that office, on the 30th day of December, 1835, for the purchase of the piece of land now in controversy, and it is numbered 13,164. This shows the quantity of the land to be 84.46 acres, and the price to be paid $1.25 per acre.

There is, also, an entry on the books of the office, of which the following is a copy, and which is photographed in the record:

"No. 13,164.]

"December 30, 1875, to John Winstanley, of St. Clair county, State of Illinois, for S. ½ N. E. ¼ section No. 3, township No. 1 north, range No. 9 west, of the third principal meridian, containing $84\frac{46}{100}$ acres, at $1.25 per acre.

$105.57.] S. H. THOMPSON, *Register*."

These, it is said, being the original entries made in the records of the local land office, are sufficient evidence of the purchase and payment for that land by Winstanley, and that no successful contradiction of them is found anywhere. When to this is added the conveyance by Winstanley to William C. Anderson of the same land, in 1837, and that Anderson's title came to Ogle, who, in 1851, took possession of the land and held it until his removal under the action of ejectment brought by Simmons against him, the case of complainant is substantially stated.

As regards the weight to be given to the possession of Ogle, it is to be considered that whether he had the equitable right or not, neither the statute of limitations nor the equitable doctrine of lapse of time could begin to have effect against any one until Simmons purchased of the United States and obtained his patent in 1874, for up to that time the legal title was undeniably in the United States. If this had not been so Ogle would have successfully pleaded the statute of limitations against Simmons in the action at law. No laches could be imputed to Simmons, who brought suit very soon after he received his patent. Nor can laches be imputed to the United

States, either as a matter of law or on any moral or equitable principles. For so common is it for squatters and trespassers to settle on the lands of the United States, and so indulgent are the laws in encouraging such settlements, and so numerous are these settlements without claim of right, that the very impossibility of resisting them, or of ejecting them, or of any efficient assertion of the right of possession by the government, that the weight of the inference in favor of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed.

Nor does the sale and conveyance by Winstanley to Anderson afford any legal evidence of his right to do so, and very little that he believed himself to have such right. He could never be made responsible for more than the purchase-money, and, knowing what entries were on the books of the local land office, he might well be willing to take the money and the chances. The evidence, therefore, in support of the entries on the books of the land office do not add greatly to its force, and the complainant's case must rest on the intrinsic probability, arising from those two pieces of evidence, that Winstanley bought and paid for the land.

If either of these entries had stated the purchase and payment in words, they are open to the weakness which arises from the fact that in all such completed sales, two other documents of superior probative force usually attend the sale, one of them invariably, neither of which is here produced or shown ever to have existed. The most conclusive of these is the patent. There is no pretense here that any patent ever issued to any one on Winstanley's purchase. It is proved that Mr. Winstanley was a careful business man, much accustomed to dealing in lands, and, as he had sold this land and made himself liable by a warranty deed, he would naturally have made that title secure by procuring the issue of the patent.

It is, however, well known that early purchasers of the public land were careless about their patents. But as a reason for this, they attached primary importance to the paper issued

when a sale was made and delivered to the purchaser by the register and receiver of the land office, called a certificate of entry.

This was a paper in two parts, the first of which, signed by the register, gave a description of the land, the amount paid for it, the name of the purchaser, and a statement that on its presentation at the General Land Office a patent would be issued to the purchaser. The second, signed by the receiver, was a simple receipt for the payment of the price, and a description of the land for which it was paid.

The statutes of almost every State and Territory in which the public lands have been sold provide for the registration of this instrument, and that in all actions concerning title or possession it shall be *prima-facie* evidence of title. (See Revised Statutes of Illinois, page 271, section 31, and page 508, section 20.) In the estimation of the people generally and in the practice of the courts this paper became the efficient substitute or equivalent of the patent, and in regard to millions of acres of land the patent either was never issued or, if issued, never delivered, but remains in the local or general land office subject to call of the owner.

In the case before us there is no evidence whatever, except presumption, that this certificate of entry ever had an existence. In the absence of the patent, it is the instrument of all others which it is important to produce, or, if it cannot be produced, to account for its loss.

The only effort to do this is an affidavit of Ogle that he went down to John Winstanley's and examined all through his papers and did not find it. He wrote to the son of Anderson, to whom Winstanley sold it, who replied that he could find no paper of the kind. He went to the Commercial Bank of Cincinnati, which at one time had a mortgage on the land. They said a majority of the papers of the bank had been burned. So he failed to get the certificate or any information about it. "I do not know where it is, nor have I ever seen it," he says.

This would have been sufficient to authorize the introduc-

tion of a copy in evidence, if any copy existed. But no copy is produced, for the reason that no human being had been found who can say that any such paper ever existed or was ever seen by any one. When we consider the number of persons interested in the property through Winstanley, there being several mortgages and intervening conveyances between him and Ogle, and that the certificate of entry, if ever made, could only have been forty years old when this suit was brought; that many persons must have been alive who had been interested in the title, this total absence of all evidence of its existence, no one ever having seen it, nor any copy of it, nor any record of it under the recording acts of Illinois, the inference that such a paper was made and delivered to Winstanley is very much shaken.

When we turn to the evidence of defendant there is much positive testimony to convince us that no such paper was ever delivered and no such sale was ever made.

There is, in pencil mark, on the page where the application of Winstanley for this land, numbered 13,164, is found, the following words: "13,164. Changed to NE. ¼ of NW. ¼, 9, 2, N. 9, W. 3d."

The transactions of the local land offices are forwarded regularly to the General Land Office at Washington, and accurate copies or duplicates are there found of all the transactions in the local offices, and in the present case the original records of the Edwardsville office, long since closed up, are in the General Land Office.

Among these are found the following:

"No. 13,164.] "LAND OFFICE AT EDWARDSVILLE, ILL.,
"*December* 30, 1835.

"It is hereby certified that, in pursuance of law, John Winstanley, of St. Clair county, Illinois, on this day purchased of the register of this office the lot or west half of the northwest quarter of section number nine, of township number two north, in range number nine west, of the third principal meridian, containing eighty acres and hundredths of an acre,

at the rate of one dollar and twenty-five cents per acre, amounting to one hundred dollars cents, for which the said John Winstanley has made payment in full as required by law.

"Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said John Winstanley shall be entitled to receive a patent for the lot above described.

"S. H. THOMPSON,
"*Register.*

"No. 13,164.] "RECEIVER'S OFFICE, EDWARDSVILLE, ILL.,
"*December* 30, 1835.

"Received from John Winstanley, of St. Clair county, Ills., the sum of one hundred dollars and cents, being in full for the west half of the northwest quarter of section number nine, township number two, north range number nine west, of the third principal meridian, containing eighty acres and $_{100}$, at the rate of $1.25 per acre.

"75 B. U. States.
"25 specie.

"$100. ——
"$100 B. F. EDWARDS, *Receiver*,
"By WM. H. RIDER."

And upon this certificate, No. 13,164, there was issued to John Winstanley a patent on the 2d day of December, 1839.

It will be observed that this certificate of entry bears date the same day of Winstanley's application for the other piece of land; that it bears the same serial number as that application throughout, up to the issue of the patent, which is very important, as though it is possible Mr. Winstanley might have entered two pieces of land on the same day, they would necessarily have been separate entries and would not have borne the same number.

For this land, without any unusual delay, there was issued a patent to Mr. Winstanley; for the other, none was ever issued.

Another circumstance confirming the truth of the pencil

memorandum is found in the cash-book or register of receivers' receipts at Edwardsville, now on file in the General Land Office. In that book, which is kept in tabular form, it is shown that on December 30, 1835, on certificate No. 13,164, there was paid to the receiver by John Winstanley $100 for the W. ½ NW. ¼ S. 9, T. 2, R. 9, 80 acres, and, as the transcript is complete for that day, no other receipt of money from Winstanley is shown. The quarterly account of the receiver with the department shows precisely the same thing.

So that we here have the evidence of these records that Winstanley bought and paid for another piece of land on that day, under cover of the same No. 13,164 as to application and entry; that the price was $100, and not $105.46; that no certificate of entry is known to have ever been made for the tract first applied for, no evidence that any money was paid for it, no entry on the cash-book or quarterly account of the receiver of the amount for which the land in controversy could only have been sold; but ample evidence that on that same day, and under the same entry number, Winstanley bought and paid for another piece of land near by, at the same office, for which he received the usual certificate of entry, and for which the patent was issued.

We cannot resist the conclusion, in the presence of what is positively shown by the records, and what is wanting in the evidence of complainant in regard to the existence of a certificate of entry of this land, that the pencil memorandum, whenever it was made, is true, that on the same day, and before the purchase was finally completed, Winstanley changed his purpose, and bought and paid for the other piece of land, and that the officers omitted to make the requisite change in the application while making the transfer and preserving the original number.

If, however, this were not so clear, the appellant here has the legal title and the possession, without fraud or any unfairness. He found the land subject to entry by the records of the land office, and he bought and paid for it and has the

title. In such case the maxim applies in all its force that better is the condition of the defendant. The equities of the parties being equal, the legal title must prevail.

Instead of the weak case made by appellee, the position of affairs required him to make clear and satisfactory proof of his superior equity. This he has signally failed to do.

The decree of the Circuit Court is therefore reversed, and the case remanded with directions to dismiss the bill.

REVERSED.

JACOB M. DUNCAN AND SIMON POEY *v.* THE STEAMSHIP FRANCIS WRIGHT, HER ENGINE, &C., HUMPHREY E. WOODHOUSE, AND JOSEPH RUDD, JR.

April 17, 1882.

1. Although the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, yet its actual jurisdiction is limited to whatever particular classes of cases or modes of proceeding which Congress sees fit to prescribe; and the act of 1875, limiting, on appeals in admiralty, the power of review to questions of law arising on a finding of facts by the inferior court, is constitutional.
2. While exceptions may be taken to the failure of the inferior court to insert in its findings material evidence, or to its finding as a fact a thing which there is no evidence to prove, yet exceptions cannot be taken to its failure to find mere incidental facts, only bearing on the ultimate fact, and not necessary to its determination.
3. Bills of exceptions should present only separate and distinct points of law; and those which, under the guise of excepting to the failure to find certain facts, set out substantially the whole evidence, and in that way endeavor to procure a review of the decisions of fact by the lower court, cannot be considered.
4. Parties engaged in transporting fresh beef from Texas to the North by a refrigerating process, charter a steamer, but without specifying in the charter the purpose for which she was to be used; her boiler leaking, it took a long time to make the voyage, and the beef spoiled: *Held*, That the warranty of seaworthiness in the charter meant only that she was capable of making the voyage, and not that she was bound to make it in any particular time, nor that she was suitable for carrying fresh beef.

Opinion of the court.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Benedict, Taft & Benedict, for appellants.

Butler, Stillman & Hubbard, for appellees.

WAITE, C. J.—Three questions have been presented on the argument of this appeal:

1. Whether Congress has the constitutional power to confine the jurisdiction of this court on appeals in admiralty to questions of law arising on the record;

2. Whether, upon the bill of exceptions, the court below erred in refusing to find certain facts which, as is claimed, were established by uncontradicted evidence, and in finding others which had no evidence at all to support them; and—

3. Whether, on the facts found, the decree below was right?

1. As to the jurisdiction.

If we understand correctly the position of the counsel for the appellants, it is precisely the same as that which occupied the attention of the court in Wiscart *v.* Dauchy, 3 Dall., 321, decided at February Term, 1796. There the question was, what could be considered under the judiciary act of 1789 on a writ of error bringing to this court for review a decree in admiralty. The decision turned on the construction to be given the twenty-second section of the act, and Mr. Justice Wilson, in his minority opinion, said: "Such an appeal," that is to say, an appeal in which all the testimony is produced in this court, "is expressly sanctioned by the Constitution; it may therefore clearly, in the first view of the subject, be considered as the most regular process; and as there are not any words in the judicial act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. Even, indeed, if positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision." Chief Justice Ellsworth, however, who spoke for the majority of the court, said: "If Con-

gress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply whether Congress has established a rule for regulating its exercise." And further on: "It is observed that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it is to be exercised, still, I say, we are bound to pursue that mode, and can neither make nor adopt another." And again: "But surely it cannot be deemed a denial of justice that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the Circuit Court has been made final, no denial of justice can be imputed to our government; much less can the imputation be fairly made, because the law directs that in case of appeal part shall be decided by one tribunal and part by another; the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England."

This was the beginning of the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. As was said by Chief Justice Marshall, in Durosseau *v.* The United States, 6 Cr., 314: "The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject." The language of the Constitution is that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as

Congress shall make." Undoubtedly, if Congress should give an appeal in admiralty causes, and say no more, the facts as well as the law would be subjected to review and retrial; but the power to except from—take out of—the jurisdiction, both as to law and fact, clearly implies a power to limit the effect of an appeal to a review of the law as applicable to facts finally determined below. Appellate jurisdiction is invoked as well through the instrumentality of writs of error as of appeals. Whether the one form of proceeding is to be used, or another, depends ordinarily on the character of the suit below; but the one as well as the other brings into action the appellate powers of the court whose jurisdiction is reached by what is done. What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than five thousand dollars. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of the case. Everything beyond that is matter of legislative discretion, not a constitutional right. The Constitution prohibits a retrial of the facts in suits at common law where one trial has been had by a jury; (Amendment, art. VII;) but in suits in equity or in admiralty Congress is left free to make such exceptions and regulations in respect to retrials as on the whole may seem best.

We conclude, therefore, that the act of 1875 is constitutional, and that under the rule laid down in The Abbotsford,

99 U. S., 440, and uniformly followed since, our inquiries are confined to questions of law arising on the record and to such rulings excepted to at the time as may be presented by a bill of exceptions prepared as in actions at law.

2. As to the questions arising on the bill of exceptions.

It is undoubtedly true that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found, when in truth there was none. Both these are questions of law and proper subjects for review in an appellate court. But this rule does not apply to mere incidental facts, which only amount to evidence bearing upon the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below, and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends.

In the present case the ultimate fact to be determined was whether the loss for which the suit was brought happened because of the insufficient refrigerating apparatus or the unseaworthiness of the vessel. It is found in express terms that the loss was "caused by the defective construction and working of the refrigerating room and apparatus connected therewith, either from inherent defects in said apparatus or from not using a sufficient quantity of ice, and not by any fault of the claimants." As to this both the Circuit and District Courts agree. This fact being established, it was unimportant to in-

quire whether the vessel was seaworthy or not. If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages.

But if it be conceded that the case depended on the seaworthiness of the vessel, we think the exceptions which have been taken cannot be considered here. The only unseaworthiness alleged was in respect to the boiler, and as to this the court has found that the boiler was a tubular one; that tubular boilers are liable to leakage in the tubes; that such leakage does not necessarily interfere with the capacity or fitness of the boiler for the purposes of navigation; that this particular boiler had one hundred and forty-four tubes; that some of these tubes gave out from time to time and were plugged up; that when the vessel arrived at Philadelphia at the end of her voyage, twenty-six of the tubes had been plugged up, but that the boiler was still efficient and seaworthy. It was also found that the voyage from Galveston to Philadelphia was two days longer than was usually occupied by well-equipped steamers, and that the vessel put back for repairs, by which an additional week's time was lost at Galveston.

The complaint now made is, that the court refused to state in its findings that there was leakage in the tubes and stoppage for repairs while the vessel was on her voyage from Philadelphia to Galveston, and while she was lying in the harbor at Galveston taking in her cargo, and that when the vessel put back to Galveston the engineer had not sufficient tools with which to make his repairs. All these are mere incidental facts, proper for the consideration of the court in determining whether the boiler and the vessel were actually seaworthy or not. It is not pretended that the question at issue was to be determined alone by the probative effect of these circumstances. They were part only of the evidence on which the ultimate finding depended, and occupy in the case the position of testimony rather than of the facts to which the law is to be applied by the judgment of the court. The refusal of the court to put such statements into the record, even though estab-

lished by uncontradicted evidence, cannot properly be brought here by a bill of exceptions, unless it also appears that the determination of the ultimate fact to be ascertained depended alone upon the legal effect as evidence of the facts stated. Such, clearly, is not this case.

There is another equally fatal objection to this bill of exceptions. An evident effort has been made here, as it has been before, to so frame the exceptions as, if possible, to secure a re-examination of the facts in this court. The transcript which has been sent up contains the pleadings and all the testimony used on the trial below. The bill of exceptions sets forth that at the trial the pleadings were read by the respective parties, and the testimony then put in on both sides. This being done, the libelants presented to the court certain requests for findings of fact and of law. These requests were numbered consecutively, sixteen relating to facts and three to the law. Afterwards six additional requests for findings of fact were presented. It is then stated that the court made its findings of fact and of law and filed them with the clerk, together with an opinion in writing of the circuit justice who heard the cause. The libelants then filed what are termed exceptions to the findings and refusals to find. In this way exceptions were taken separately to each and every one of the facts found, and the conclusions of law, and to the refusal to find in accordance with each and every one of the requests made. The grounds of the exception are not stated. Many of the requests of the libelants are covered explicitly by the findings as actually made, some being granted and others refused.

We have no hesitation in saying that this is not a proper way of preparing a bill of exceptions to present to this court for review rulings of the Circuit Court such as are now complained of. A bill of exceptions must be "prepared as in actions at law," where it is used "not to draw the whole matter into examination again," but only separate and distinct points, and those of law. (Bac. Ab., Bill of Exceptions; 1 Saund. Pl. & Ev., 846.) Every bill of exceptions must state and point out

distinctly the errors of which complaint is made. It ought also to show the grounds relied on to sustain the objection presented, so that it may appear the court below was properly informed as to the point to be decided. It is needless to say that this bill of exceptions meets none of these requirements. From anything which is here presented no judge would be presumed to understand that the specific objection made to any one of his findings was that no evidence whatever had been introduced to prove it, or to one of his refusals, that the fact refused was material and had been conclusively shown by uncontradicted testimony. No ground whatever is stated for any one of all the exceptions that have been taken. To entitle the appellants to be heard here upon any such objections as they now make to the findings, they should have stated to the court that they considered the facts refused material to the determination of the cause, and that such facts were conclusively proven by uncontradicted evidence. Under such circumstances it might have been permissible to except to the refusal, and present the exceptions by a bill of exceptions which should contain so much of the testimony as was necessary to show that the fact as claimed had been conclusively proven. And so if the exception is as to facts that are found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated into the bill of exceptions. In this way the court below would be fairly advised of the nature of the complaint that was made in time to correct its error, if satisfied one had been committed, or to put in the bill of exceptions all it considered material for the support of the rulings.

From this it is apparent we cannot on this appeal consider any of the rulings below which have been presented by the bill of exceptions.

3. As to the sufficiency of the facts found to support the decree.

Upon this branch of the case we have had no more difficulty

than upon the others. The case made may be generally stated as follows:

The libelants, being about to engage in the business of transporting fresh beef by the use of a newly-patented process, applied to the claimants for a charter of their steamer for six months, to be put into that trade. The claimants knew for what business the vessel was engaged, and the libelants knew that she was furnished with a tubular boiler. Such boilers are liable to leak, but that does not necessarily interfere with their capacity or fitness for the purposes of navigation. The charter-party contained this clause:

"First. The said party of the first part (the claimants) agrees the said vessel, in and during the said voyage, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite for such a voyage."

No mention was made in the charter of the special business in which the vessel was to be engaged. She was chartered generally for six months to run between Philadelphia and New York and Galveston, or any intermediate safe port in the United States, or any foreign port not prohibited by the insurance. The only complaint made as to her seaworthiness is in respect to her boiler, and about this it is found that though to some extent leaking, as boilers of that class are liable to be, it was still efficient and seaworthy. The libelants fitted the vessel with necessary apparatus for the use of their patented process, and, with a full knowledge that her boiler was apt to leak, put a cargo of fresh beef on board to be taken from Galveston to Philadelphia. The vessel was twenty-three days in making that voyage instead of fourteen, which was the usual time of well-equipped steamers. The beef was spoiled before it got to Philadelphia, but it is expressly found that this was because of the defective construction and working of refrigerating room and the apparatus and machinery connected therewith, for which the claimants were in no respect responsible.

Upon these facts the court below dismissed the libel, which we think was clearly right. That the vessel was in fact sea-

worthy is settled by the findings. All the claimants covenanted for was that she was provided with every requisite for safe navigation. While they knew that her charterers intended to use her in connection with their contemplated business, it is neither found nor insisted that any higher degree of seaworthiness was required for that kind of transportation than any other, much less that the claimants knew it. Under these circumstances the language of the charter-party is to be construed only as an agreement that the vessel was seaworthy for the purpose of navigating such a voyage as she was chartered to make, without any regard to what she was to carry. The claimants did not contract that their vessel was in a condition to make her voyages in any particular time, but only to make them safely. They were not applied to for a vessel suitable for carrying fresh beef, but for one suitable for navigation generally between the designated ports and places. Such a vessel, according to the findings, they got. It was their fault alone if they did not apply for what they wanted. They took all the risks of the undertaking, except such as arose from the general unseaworthiness of the vessel when she was delivered into their possession, for after they got her she was to be subject to their entire control within the terms of the charter. If repairs were necessary to keep her in a seaworthy condition while under the charter, the claimants might be chargeable with the expense of making them; it would be the duty of the charterers to see that they were made, or to notify claimants of what was required. The provision that the claimants were to nominate and the charterers appoint the engineer, and that the appointment of the captain by the charterers should be subject to the approval of the claimants, did not affect the relation of the parties in this particular. Delays growing out of derangement in the machinery were to be deducted from the charter time, and the pay for the use of the vessel correspondingly reduced, but beyond that the owners were not to be bound if the vessel was actually seaworthy when delivered into the possession of the charterers under the charter.

The decree of the Circuit Court is AFFIRMED.

THE CITY OF HANNIBAL *v.* THOMAS FAUNTLEROY.

April 17, 1882.

A legislative act requires that certain bonds of a city must be authorized to be issued by a majority of the tax-payers. By the charter of the city at the time of the election in question only tax-payers were qualified voters. The holder of the bonds in suit offered to prove this by the poll-books, which showed that a large majority of the votes cast was for authorizing the issue of the bonds, but did not show that the voters were tax-payers: *Held*, That the plaintiff was not bound to prove this latter fact, but that it would be presumed that the officers conducting the election received the votes only of those properly qualified, and hence that only tax-payers voted.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

J. M. & C. H. Krum, for plaintiff in error.

James Grant, for defendant in error.

MATTHEWS, J.—This was an action brought by the defendant in error, a citizen of Virginia, against the city of Hannibal, a municipal corporation of Missouri, to recover the amount of principal and interest alleged to be due on certain municipal bonds and coupons. The bonds are dated April 1, 1858, for $1,000 each, and are payable twenty years after date to A. O. Nash, auditor of said city, or bearer, at the American Exchange Bank, New York, for value received, without defalcation, with interest at the rate of ten per centum per annum, payable semi-annually, on the first day of October and April in each year, upon presentation of the annexed coupons severally, until the payment of the principal sum. The bonds purport on their face to have been issued to pay calls on subscription for stock in the Pike county railroad, Illinois. They contain no other recitals. They were issued, it is claimed, under the authority of an act of the Legislature of Missouri, passed February 27, 1857, to amend the charter of the city of Hannibal, the third section of which reads as follows:

"SEC. 3. Said city council shall have power to subscribe for and take stock in any railroad terminating at the city of Hannibal, or upon the bank of the Mississippi River opposite to said city, in the State of Illinois. But before such subscription shall be valid, it shall be ratified by a majority of the tax-payers, at a poll to be opened for that purpose."

The second section of the same act provided that "said council shall also have power to borrow on the credit of the city and to pledge the revenues and public property for the payment thereof; but a greater rate of interest than ten per cent. shall not be paid on any sum borrowed unless two-thirds of the qualified voters of said city, at polls to be opened for that purpose, shall instruct the payment of a greater rate."

It is, therefore, not denied that the bonds are binding obligations upon the municipal corporations, provided the subscription to the stock of the Pike county railroad, in payment of which they were issued, was lawfully made; and no question is made as to the validity of this subscription, except that it was not ratified, as is claimed, by a majority of the tax-payers, in accordance with the provisions of the third section of the amended charter.

It appears that at a called meeting of the city council of the city of Hannibal, held on October 22, 1857, an ordinance was duly passed authorizing and directing the subscription of one hundred thousand dollars stock in the Pike county railroad, as follows:

"Be it ordained by the city council of the city of Hannibal, as follows:

"SEC. 1. That the mayor of the city of Hannibal be and is hereby authorized and directed to subscribe for and take for the city of Hannibal one hundred thousand dollars stock in the Pike county railroad, having its western terminus on the bank of the Mississippi River, at a point in the State of Illinois opposite the city of Hannibal, within a one-half mile of the western terminus of the Sag City Plank Road; said stock to be paid for in the bonds of the city of Hannibal at their par

value, which bonds are to be made payable not exceeding twenty years from the date of their issue, and are to bear ten per cent. interest per annum, payable semi-annually.

"SEC. 2. That the mayor be and is hereby directed to cause a poll to be opened in said city of Hannibal for the purpose of obtaining the ratification of the foregoing said subscription of one hundred thousand dollars stock in said Pike county railroad by the tax-payers of said city of Hannibal, in accordance with the provisions contained in the third section of an act passed by the General Assembly of the State of Missouri, entitled 'An act to amend the charter of the city of Hannibal,' approved February 27, 1857.

"SEC. 3. This ordinance to take effect from and after its passage."

On the trial of the cause in the Circuit Court, the plaintiff, recognizing his obligation to prove affirmatively that the bonds in question had been issued under the authority of the law, introduced in evidence the poll books of an election held at voting places in the three wards of the city of Hannibal, on the first Monday (the 2d day) of November, 1857, for the purpose of electing a mayor, marshal, recorder, and attorney for said city, three councilmen for each ward, and for the ratification of the subscription of one hundred thousand dollars of stock in the Pike county railroad. These poll books contain the name of every voter, with a record of his vote, whether for or against ratification, and are authenticated by the certificate of the judges and the clerks of the election, stating the result, and specifying in their return, under the head "for ratifying the subscription of $100,000 stock in Pike county railroad," the number of votes cast in favor of and against the ratification. The result as shown by these poll books, in the aggregate, was, that three hundred and sixteen votes were cast in favor of and thirty-two against the ratification. At a called meeting of the city council of the city of Hannibal, on November 4, 1857, it is recorded that the clerk read to the city council the certificate of the mayor and one judge of the elec-

tion from each ward in the city, whereby it was shown to the satisfaction of the council that at the municipal election held in the several wards on Monday, November 2, 1857, certain persons named therein had been duly elected to the several offices therein specified, and thereupon it was resolved that certificates be made out and delivered to the officers elect, and at the conclusion of the entry upon the record there is the statement—"for ratification, three hundred and sixteen votes, against, thirty-two votes."

At a regular meeting of the city council on December 7, 1857, it is recorded that, "on motion of Mr. Dowling, resolved, that the mayor be and he is hereby authorized and instructed to issue the bonds of the city to the Pike county railroad, in accordance with calls on the capital stock made by order of the board of directors and in pursuance of an ordinance approved October 22, 1857."

The stock subscribed for was duly issued to the city of Hannibal, and is still held by it; and the corporation has continuously exercised the privileges of a stockholder, though it is admitted that the stock has no pecuniary value.

It was also proved that in various ways, prior to the institution of this suit, the city of Hannibal had admitted its liability upon these bonds by making arrangements for the payment of coupons as they fell due, receiving them in payment of taxes due to it, permitting judgment to be rendered against it on account of unpaid coupons, once by consent and once by default; but to the whole evidence on the part of the plaintiff below, it was objected by the plaintiff in error that it was insufficient to establish the liability of the city, because it failed to show a ratification of the subscription to the stock of the railroad company by a vote of a majority of tax-payers at an election called and held for that purpose.

The answer to this objection, however, is found in the provisions of article 1, section 10, of the charter of 1851 of the city of Hannibal, (Laws of Missouri, 1851, page 327,) admitted

to have been in force at the time, which defined the qualification of voters as follows:

"SEC. 10. All free white male citizens who have arrived at the full age of twenty-one years, and who shall be entitled to vote for State officers, and who shall have resided within the city limits at least six months next preceding any election, and, moreover, who shall have paid a city tax or any city license according to ordinance, shall be eligible and entitled to vote at any ward or city election for officers of the city."

It thus appears that no person could lawfully vote at the election held November 2, 1857, for city officers, except tax-payers; and assuming that the list of names contained in the poll books as having voted for or against the ratification of the subscription to the stock in the Pike county railroad are those of the same persons who voted for city officers, it follows that they must all have been tax-payers, on the presumption, which certainly must be applied, that they were all legally entitled to vote.

It is argued that the Legislature used the word "tax-payers," in the 3d section of the act of 1857, in a sense designedly differing from that of "qualified voters," in the 2d section, who are to decide upon the question of the rate of interest on money borrowed in excess of the ten per cent. per annum. We see no evidence, however, of such an intention. On the contrary, that supposition would necessitate the conclusion that by the word "tax-payers" the Legislature meant to include persons not otherwise qualified to vote; for example, not free white male citizens, minors, women married and unmarried, and non-residents. The reasonable interpretation is, that the question of ratifying the subscription should be submitted to the vote of the tax-payers of the city having the qualification otherwise of lawful voters; and this included, as we have seen, all the qualified voters of the city.

To allow the present objection to prevail would require the holder of these bonds not only to show that the persons voting to ratify the stock subscription were all tax-payers, but also

that they had all the other requisite qualifications of persons entitled by law to vote. In our opinion the law imposes no such unreasonable burden upon the owner of such bonds. He is bound to show, in the absence of recitals that prevent its denial, that the corporation issued them in the exercise of a power conferred by law; and where that can arise only in consequence of the performance of a condition precedent, such as the result of an election by a public vote, he has the burden of proof to show the fact. That fact, as in the present case, is fully proven by an exhibition of the record, which shows on its face the result claimed. He is not bound to sustain the truth of the record, as if it were the case of a contested election, and prove that the majority, on the existence of which his rights rest, consisted of persons all of whom possessed the qualification of voters. Whether each voter was lawfully such, was a question, in the first place, in the present case, for the judges of the election, who were appointed under the law for the express purpose of receiving and deciding upon their votes; and in the second place, for the city council, to whom the official return of its election and of its result was made, as required, and who were authorized to act upon that result as certified to and verified by themselves, in the very matter of consummating the subscription, which was the subject of the vote. It would be impracticable for any purchaser of the bond, put on inquiry as to the authority of the city council to make the issue of the bonds in question, to make inquisition into the facts of the election beyond these returns and records; and it is but reasonable to permit him safely to rest his rights upon them as they appear. They show the fact that the subscription to the railroad stock was ratified by a majority of the voters presumed to be qualified to vote, because permitted by the authorities controlling the election to do so, at an election held for the purpose, among other things, of deciding that question; and that fact constitutes the condition on which the authority to issue the bonds by law depends, and is the guarantee of their validity.

We find no error, therefore, in the judgment of the Circuit Court, and it is accordingly affirmed.

AFFIRMED.

THE SWIFT AND COURTNEY AND BEECHER COMPANY v. THE UNITED STATES.

April 17, 1882.

It being entirely clear from the internal revenue laws that manufacturers of friction matches are entitled to a commission of ten per centum on the whole amount of stamps purchased by them, when furnishing their own dies, a uniform practice of the department to allow ten per centum in stamps at their face value, and only on the amount of money paid by purchasers, is not binding, unless it is proved to have been acquiesced in or agreed to; and a long-running account between the department and certain purchasers, treated by both not as an aggregation of separate items, but as a running account, is not sufficient proof of such acquiesence.

APPEAL from the Court of Claims.

George H. Williams, for appellant.

S. F. Phillips, Solicitor-General, for appellees.

MATTHEWS, J.—The appellant filed its petition in the Court of Claims for the recovery of certain commissions alleged to be due to it on purchases of proprietary stamps under the internal revenue laws.

It alleged that it was, during the period covered by the transactions set out, the proprietor, manufacturer, and vendor of friction matches; that as such, at the beginning of its business, it furnished to the Commissioner of Internal Revenue its own die for stamps, to be used especially for its own proprietary articles; that during said period, from time to time, and continuously on different days of each and every month, it sent to the Commissioner of Internal Revenue sums of money from one thousand to ten thousand dollars, as suited its convenience,

and that said commissioner transmitted to it stamps, as it needed and ordered; so that in the account between it and the commissioner as to said stamps, the creditor side showed moneys received by the latter in certain sums and at certain dates, but showed the receipt of no sum less than one thousand dollars; and the debtor side of said account showed that stamps were sent by the commissioner to the appellant in different sums and at different dates, but never in amounts less than one thousand dollars.

It is further averred that upon the whole amount of stamps purchased during the period referred to, it was entitled to a commission of ten per centum in money, amounting to $389,720.40, which the commissioner has refused to allow, and has allowed in lieu thereof $354,291.27 in stamps at their face value; insisting such to be the long-established practice of the office, to which he must adhere till changed by legislation or judicial decision. The appellant, in the petition, in reference to this practice, avers "that the allowances made to it from time to time between May 6, 1870, and December 24, 1878, have been in accordance with the uniform practice of said internal revenue office from its organization; but petitioner avers that at different times prior to 1866 protests were made to the Commissioner of Internal Revenue by and on behalf of the manufacturers of friction matches against such a construction of the statute by him, by which only ten per cent. commission in stamps at their face value were allowed by him upon the amount of money paid by the purchasers, instead of ten per cent. upon the whole amount of stamps purchased; and that such facts are and have always been known to petitioner."

It is also averred that the appellant gave the required security for a credit of sixty days upon its purchase of stamps, as provided for in the internal revenue act of June 30, 1864, (13 Statutes at Large, 294,) which enacted, "that the Commissioner of Internal Revenue may from time to time furnish, supply, and deliver to any manufacturer of friction or other matches, cigar light or wax tapers, a suitable quantity of ad-

hesive or other stamps, such as may be prescribed for use in such cases, without prepayment thereof, on a credit not exceeding sixty days, requiring in advance such security as may be judged necessary to secure *judgment* [payment?] therefor to the treasurer of the United States within the time prescribed for such payment."

The defendant filed a general demurrer, which was sustained, and judgment rendered dismissing the petition. To review this judgment the present appeal has been prosecuted.

The act of July 1, 1862, section 102, to provide internal revenue, &c., (12 Statutes at Large, 477,) authorized the commissioner of internal revenue to sell to and supply collectors, deputy collectors, postmasters, stationers, or any other persons, at his discretion, with adhesive stamps, upon the payment at the time of delivery of the amount of duties said stamps represent, and thereupon to allow and deduct from the aggregate amount of such stamps the sum of not exceeding five per centum as commission, with the proviso "that any proprietor or proprietors of articles named in schedule C who shall furnish his or their own die or design for stamps, to be used especially for his or their own proprietary articles, shall be allowed the following discount, namely: on amounts purchased at one time of not less than fifty nor more than five hundred dollars, five per centum; on amounts over five hundred dollars, ten per centum."

By the amendatory act of March 3, 1863, (12 Statutes at Large, 714,) the word "commission" was substituted for "discount" in this proviso.

This section as thus amended was re-enacted as section 161 of the act of June 30, 1864, (13 Statutes at Large, 294,) and schedule C enlarged so as to include friction matches, (p. 302.)

The act of July 14, 1870, section 4, (16 Statutes at Large, 257,) continued in force the same provision, directing that proprietors of articles named in schedule C who shall furnish their own dies shall be allowed commissions on amounts over

five hundred dollars, "ten per centum on the whole amount purchased."

It will be perceived, on examining this legislation, that while in respect to adhesive stamps sold, other than those to proprietors of articles named in schedule C from their own dies for their own use, the rate of the commission to be allowed to the purchaser shall not exceed five per centum, but within that limit is subject to the discretion of the Commissioner of Internal Revenue; while in respect to those of the latter class, including stamps on friction matches, the rate is fixed by the statute itself, and in the form as expressed in the act of 1870, where the amounts of purchases are over five hundred dollars, the commissions are established at ten per centum on the whole amount purchased. So that, while in the sale of adhesive stamps of the former description, in the exercise of his discretion as to the rate, the commissioner might lawfully provide that the commissions should be paid only in stamps at their face value, yet, in the sale of stamps to proprietors of friction matches, he was not authorized to diminish the commission by any such regulation, but was required to allow and pay in money ten per centum, calculated on the amount of stamps purchased, on all sales exceeding five hundred dollars in amount.

In the present case the appellant was allowed commissions, not on the whole amount of stamps furnished him, nor in money, but in stamps at their face value, calculated on the amount of money paid by him. The difference between the amounts, resulting from these two modes of calculating and allowing commissions, is the amount sought to be recovered by the appellant.

There is no serious question raised as to the proper construction of the internal revenue acts upon the point, it being virtually admitted that the contention on the part of the appellant upon the provision of the statutes is correct.

It is met, however, in the opinion of the Court of Claims and in argument on behalf of the government here, that the contrary construction, to pay these commissions in stamps at

their face value, has been acted upon by the Commissioner of Internal Revenue from the beginning; has been acquiesced in by purchasers and dealers, and has never been changed by Congress; and, as an official practice, has thus acquired the force of law; or if not, then at least it was a course of dealing well known to the appellant and acquiesced in, by which it accepted stamps at their face value in payment of its commissions, which it is not at liberty now to open, question, and reverse.

The right construction of the internal revenue acts upon the point of the allowance of commissions to dealers in proprietary articles purchasing stamps made from their own dies and for their own use, is too clear to bring the case within the first alternative. The rule which gives determining weight to contemporaneous constructions put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt. (Edwards' Lessee *v.* Darby, 12 Wheat., 210; Smythe *v.* Fisk, 23 Wall., 382; United States *v.* Moore, 95 U. S., 763; United States *v.* Pugh, 99 U. S., 269.)

And we are of opinion that the averments of the petition admitted by the demurrer do not bring it within the operation of the principle invoked in the second alternative. The case made by the petition is not that of successive and independent purchases of stamps settled for at the time when the commissions given by the law were paid by the commissioner, the purchaser voluntarily accepting payment, not in money, but in other stamps, and new dealings of the same character, but separate as to each instance, had afterwards upon the same footing and by mutual understanding. On the contrary, the business was conducted upon the footing of a running account. Money was paid on account of stamps furnished or to be furnished, in sums differing in amount, but not less in any case than five hundred dollars; and stamps were supplied in varying quantities, as ordered, without reference to corresponding and equivalent payments of cash—a bond with satisfactory security, in pursuance of law, having been given and accepted,

to secure the government against loss in consequence of purchases on credit. The dealing is, undoubtedly, evidence that the appellant was willing to purchase stamps, to be paid for by a credit in account, in lieu of cash for commissions; but it does not prove that he was willing to waive his right to a commission upon the stamps so purchased. And it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts from which an agreement to do so might be inferred, but an actual settlement based upon such an understanding. The allegations in the petition, in our opinion, do not constitute such a bar to the recovery sought, and the demurrer interposed should not, therefore, have been sustained.

For this error, the judgment of the Court of Claims is reversed, and the cause remanded for further proceedings in accordance with law; and it is so ordered.

REVERSED.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY v. THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

April 17, 1882.

A funding act of a State authorizing the funding of its debt, but excluding from its provisions some bonds of doubtful validity until their validity was established by a decree of a court in a proceeding provided for that purpose, does not impair the obligation of those bonds, even though in that special proceeding proof of their invalidity is allowed as against a *bona-fide* holder.

ERROR to the Supreme Court of the State of Louisiana.

W. W. Howe, *J. H. Kennard*, and *W. A. Butler*, for plaintiff in error.

Gus. A. Breaux, *John McEnery*, and *James Lingan*, for defendant in error.

WAITE, C. J.—This is a writ of error to the Supreme Court of Louisiana, and the Federal question rests on the following facts:

Opinion of the court.

On the 8th of March, 1869, the General Assembly of the State passed act No. 116 of 1869 to authorize an issue of negotiable State bonds to aid in the construction of the Mississippi and Mexican Gulf Ship Canal. Special provision was made in the act for taxation to meet any liability that might be incurred in this way. Bonds to the amount of $480,000 were put out, purporting on their face to have been issued under the authority thus granted, and the New York Guaranty and Indemnity Company, for all that appears to the contrary, became the *bona-fide* holder of two hundred and fifty thousand dollars of this amount.

On the 24th of January, 1874, act No. 3 of 1874 was passed to provide for funding the obligations of the State by an issue, if necessary, of $15,000,000 of "consolidated bonds of the State of Louisiana." To accomplish this a "board of liquidation" was created, with power to execute the new bonds and exchange them for old at the rate of sixty cents of the new for one dollar of the old. If the board rejected any bond offered for exchange, the holder could apply by petition to some proper court for relief, and if on that petition final judgment should be rendered in his favor against the board, he would be entitled, on giving up his old bond, to get one of the new on the terms proposed.

On the 14th of March in the same year, 1874, act No. 55 of 1874 was passed, which purported to prohibit all State officers from levying or collecting any tax to pay the principal or interest falling due after January 1, 1874, of any of the State debt, unless such levy and collection was specially authorized by some law of the State subsequently adopted, and also prohibiting the setting apart of any funds in the treasury for any such payment. The same law purported to take away from the courts of the State all power or jurisdiction to arrest or impede its operation by mandamus, injunction, or otherwise.

On the 17th of March, 1875, act No. 11 of 1875 was passed to prohibit the board of liquidation from funding, under act No. 3 of 1874, questionable and doubtful obligations of the State,

"until said bonds * * * shall first, by the final decree of the Supreme Court of the State of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law and not in violation of the Constitution of this State or of the United States, and for a valid consideration." In this act the bonds issued in aid of the Mississippi and Mexican Gulf Ship Canal Company were specially designated as questioned and of doubtful validity.

After this act was passed the Guaranty and Indemnity Company, being desirous of funding its bonds under the provisions of act No. 3, filed its petition in the Fifth District Court of the parish of Orleans, praying that the bonds "be decreed to have been issued in strict conformity to law and not in violation of the Constitution of this State or of the United States, and that they be declared legal and valid obligations against the State of Louisiana and issued for a valid consideration. No other judgment was asked than such an one as was necessary, under act No. 11 of 1875, to secure the benefit of act No. 3 of 1874 —the funding act. This petition got, in due course of procedure, to the Supreme Court of the State, and it was there decided that the suit thus begun was not one for the recovery of the money due on the bonds, but was rather in the nature of an inquisition to determine whether the bonds in question were of the class which the State had determined to include in its funding scheme. For this reason the court held that for the purposes of such an inquiry the petitioner occupied no better position as a *bona-fide* holder than he would if he had been the first taker. Because of this ruling the present writ of error has been brought.

This statement of the case is sufficient, as we think, to show that the question below was not whether, in an action against the State, properly authorized, to recover the amount due upon the bond, act No. 11 permitted the State to prove, as against a *bona-fide* holder, that the bond was invalid, but whether the *bona-fide* holder of an invalid bond was entitled to the benefit

of the scheme of compromise which the State had offered to the holders of its securities that were valid in the hands of the first taker. Such being the case, no obligation of the original contract has been impaired. Every legal right which the original taker acquired when the bond was put out still remains. The guaranty company may enforce all such rights now in any appropriate manner. All the court below has said is, that as between the State and the first taker the bonds were not valid obligations, and that, consequently, they are not entitled to the privileges of the funding laws. The obligation of the State to pay the bonds in money to the *bona-fide* holders in accordance with the original promise still remains. The judgment which has been rendered, and which we are now reviewing, is no bar to any proper proceeding for that purpose. The suit which was authorized and the suit which was actually begun only related to the right of the holder to come into the compromise which the State offered to certain classes of its creditors. The judgment is that the bonds do not belong to any of the designated classes. The question here is not whether, if that inquiry were open to us, we should be of the same opinion, but whether the obligation the State is under to the company has been impaired by act 11 of 1875, as thus construed. We think the State had the right to say, when it proposed a scheme for the compromise of its debts, what creditors should be included. That, in our opinion, is all that has been done.

It follows that the Federal question was decided right below, and the judgment is consequently affirmed.

AFFIRMED.

CHARLES GUIDET v. THE CITY OF BROOKLYN.

April 17, 1882.

Guidet's reissued patent No. 4106, dated August 23, 1870, claiming as his patent the use of stone blocks for paving in the form of parallelopipeds with rough side surfaces, but without saying how rough, is void, it

Opinion of the court.

being proved that blocks of that character had been in use before his patent, and his patent merely being an improvement in the amount of roughness to be used, and not being patentable.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

George Harding, for appellant.

George Gifford and *William C. De Witt*, for appellee.

WAITE, C. J.—The invention of Guidet covered by his reissued patent may fairly be stated thus: "Take stone blocks in the form of parallelopipeds, with the ends sufficiently smooth and the sides sufficiently rough, and put them together in a street pavement so that the ends will be parallel to the street and the sides at right angles." How large the blocks should be, how smooth the ends, or how rough the sides, is nowhere stated. All that has been left to the judgment and skill of him who does the work.

The evidence leaves no doubt whatever in our minds that pavements made of blocks of stone broken into the general form of parallelopipeds, and set on edge with their ends parallel to the street and their sides across it, were in use long before the date of Guidet's invention. This is conceded, in fact, both in the original patent and the reissue; for in the original it is said: "I do not claim broadly as my invention a pavement composed of blocks made in the form of parallelopipeds;" and in the reissue, "I am aware that pavements have been produced of blocks made in the form of parallelopipeds." The difficulty had been, undoubtedly, that the spaces between the sides of the blocks in ordinary use before Guidet's invention were not sufficient to furnish a firm foothold for draught animals, especially after the surfaces had been worn smooth. How to remedy this defect was the problem to be solved. Formerly it had been done, as is said in the reissued patent, by interposing between the adjoining blocks thin strips of wood or stone. As a substitute for this,

Guidet chamfered the edges of the broad sides, and thus got the advantage of placing the blocks close against each other, and keeping the pavement firm while he secured on the surface the necessary open joint to furnish a good foot-hold. That, as it seems to us, was all there was of his invention, and we are by no means inclined to hold it was not patentable to him. He took the block of stone in ordinary use, and by substituting the chamfered edge on the broad side for the narrow strip of wood or stone, got the space that was needed for the joint, and solidified the pavement by bringing the stones that furnished the surface, which was to be used for travel, firmly together.

But after he got his patent he seems to have found that by selecting blocks sufficiently rough on their sides the joints could be made open enough for all practical purposes without chamfering, and so in his reissue he abandoned that feature of his patent, and claimed for rough side surfaces only. In this way, as it seems to us, he left the field of invention and entered that of mechanical skill only. Pavements of stone, in the form of parallelopipeds, being confessedly old, he has really done no more than suggest the best kind of stone to be used in that way. The pavements in Rochester and Buffalo, which it is agreed antedated his invention, were laid in all substantial respects like his. The quality of the stone was different, and the side surfaces were comparatively smoother than his, though to some extent they were rough. He, as has already been seen, does not say what degree of roughness is required. The effect of his specification and claim is that if blocks are selected with their sides rough enough, joints can be made that will furnish a suitable foot-hold without the use of strips and without chamfering. It is true that in Rochester and Buffalo sand may have been used to some extent to keep the blocks apart, but that was only another way of doing what it is agreed had been done before. What Guidet did was to show that if stone were used with rougher side surfaces than those found in the old pavements, all artificial means of

keeping the transverse joints open might be abandoned, and the requisite surface secured. This was simply carrying forward the old idea, and doing what had been done before in substantially the same way, but with better results. The change was only in degree, and consequently not patentable. Clearly the reissued patent cannot be sustained.

The decree is affirmed.

AFFIRMED.

THE STATE OF LOUISIANA, ON THE RELATION OF THE SOUTHERN BANK, v. EDWARD PILSBURY, MAYOR OF NEW ORLEANS, ET AL.

April 17, 1882.

1. Section 37 of the act of the Louisiana Legislature of February 23, 1852, consolidating into one the three previously existing municipalities within the limits of New Orleans, adding to it the adjacent city of Lafayette, providing for funding the debts of the old corporations into obligations of the new, and providing a special annual tax for the payment of the interest and for a sinking fund, became, as soon as the bonds were put on the market and purchased, a contract, of which the provision for the annual tax was an essential part.
2. An act "to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," which provides for the funding of the municipal indebtedness, is not repugnant to the article of the State Constitution which requires every legislative act to embrace but one object, which shall be expressed in its title; for the requirement of the Constitution is satisfied if the different provisions of the act are all germane to the general subject indicated by the title.
3. Article 127 of the Louisiana Constitution of 1845, providing that "taxation shall be equal and uniform throughout the State," and that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied," applies only to State and not to municipal taxation, and did not require that all property in the State should be taxed, but simply that all property which was taxed should be equally taxed.
4. A change of judicial construction of a statute or of the organic law is prospective only, and does not affect existing contract rights.
5. The acceptance by the creditors of their interest raised in a different mode than that prescribed in the contract is no waiver of their right to insist on the contract.

Statement of the case.

6. The act of the Louisiana Legislature of March 6, 1876, funding the former debts into premium bonds, providing that a certain number of these should be paid each year, determining what ones were to be paid by chance in a lottery, providing a certain tax for the payment of the ones so selected, and postponing for fifty years the payment of either principal or interest of the remainder, repealing the special tax above mentioned and the power of the city council to levy any tax for the payment of any other bonds or interest, and abolishing the writ of mandamus for the enforcement of payment of any other bonds, is totally null and void, (1) because it abolishes the special tax provided by the act of 1852 and provides no other sufficient means of raising the money necessary to fulfill the contract made by this latter act; (2) because it abolishes the remedy of mandamus existing when the contract was made, and substitutes no sufficient remedy in its stead.

ERROR to the Supreme Court of the State of Louisiana.

This was a petition of the State of Louisiana, on the relation of the Southern Bank, a corporation created under its laws and doing business in New Orleans, to one of its District Courts, for a mandamus to compel the municipal authorities of that city to levy a special tax to pay certain coupons on outstanding bonds issued under an act of the State in 1852, and to purchase the bonds with any surplus remaining of the moneys collected. The history of the issue of the bonds is as follows: The city of New Orleans was originally incorporated by an act of the Legislature in 1805, and its charter continued in force until the 8th of March, 1836. An act was then passed which divided the city into three municipalities, each of which was created a distinct corporation, with "such rights, powers, and capacities as are commonly incident" to municipal bodies. This division continued until February 23, 1852, when an act was passed, known as act No. 71 of that year, by which the three municipalities were again united into one. The act was entitled "An act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs." The city, when divided into three municipalities, was in debt; and the act making the division provided that a proportionate part of it should be paid by each municipality, the quota being fixed upon the basis of the amount of taxes

and other revenue accruing to it. The separate municipalities had also created debts; and the act of February 23, 1852, in consolidating them, provided for the issue of bonds for the payment of their debts, and also for the debt of the old city. The thirty-seventh section, which dealt with this subject, is as follows:

"SEC. 37. *Be it enacted, &c.*, That the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities, whether in the form of bonds, notes, interest coupons, cash warrants, or other species of obligation whatever, shall be assumed and paid by the city of New Orleans, and said city is hereby declared liable therefor. The mayor, comptroller, and treasurer, and chairmen of the finance committees of the two boards of the common council, shall constitute a commission, to be called the commissioners of the consolidated debt of New Orleans; and they shall have power to issue bonds of the city of New Orleans, having not more than forty years to run, with interest payable at such place as may be agreed on between said commissioners and the parties to whom the bonds are issued, in semi-annual coupons, *in exchange for any bonds*, obligations, or debts of the old corporation, or of any of the old municipalities, whether matured or not, or to sell the new bonds and apply the proceeds to the payment of the matured debts of the old corporation or of the municipalities, but to no other purpose. The bonds thus issued shall form a stock to be called the consolidated debt of New Orleans. At the time this act goes into operation, an exact and detailed statement of the indebtedness of the old corporation and of each municipality shall be filed in the office of the comptroller, by the secretary of the board of liquidators and the municipal comptrollers respectively, when the commissioners of the consolidated debt shall proceed to divide the debt of the old corporation between the several municipalities, in proportion to the assessed value of real estate within the limits of each, according to the State assessment roll for 1851. The amount thus apportioned to

each, together with its individual indebtedness at the time this act goes into operation, shall constitute the separate debt of each municipality, and shall be known as the debt of municipality No. 1, No. 2, No. 3. The common council shall, annually, in the month of January, pass an ordinance to raise the sum of six hundred thousand dollars by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent. of said tax in each municipality shall be in proportion to the indebtedness of each. All ordinances, resolutions, or other acts passed by said council after the first day of January, in each year, shall be null and void, unless the ordinance imposing the consolidation loan tax shall have been previously passed. At the end of each and every year, any surplus of the consolidated loan tax remaining in the treasury, after the payment of all the interest and the expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such bonds issued under this act as have the shortest period to run; and the common council shall have the right of rejecting all bids demanding more than the face of the bonds; for which purpose, public notice shall be given by the comptroller in the official gazette for thirty days, inviting proposals from bondholders for the sale to the city of the bonds herein described. From and after the passage of this act no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the city of New Orleans or under its authority; nor shall any loan be contracted, unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the city council, after ten days' proclamation by the mayor, in the newspaper chosen by the common council; and no ordinance creating a debt or loan shall be valid unless such ordinance shall prescribe ways and means for the punctual discharge at maturity of the capital borrowed or debt incurred; and such ordinances shall not be repealed until principal and interest

of the capital borrowed or the debt incurred are fully paid and discharged."

By a supplementary act, approved on the same day, known as No. 72 of the year, the adjacent city of Lafayette was added to the city of New Orleans, and provision was made for the assumption and payment of its debt. The fifth section of the act is as follows:

"SEC. 5. *Be it further enacted, &c.*, That the debt of the city of Lafayette shall be assumed and paid by the city of New Orleans, and the said city of New Orleans is hereby declared liable therefor; and the amount of said debt shall be ascertained, and its payment provided for and made, in the same manner as the debt of each municipality of New Orleans is ascertained and provided for in the act to which this act is a supplement; and in raising annually the consolidation loan tax for the payment of the debt of New Orleans, an additional sum of fifty thousand dollars shall be raised for the purpose of providing for the debt of the city of Lafayette, now added to that of New Orleans, so that the whole amount of the annual levy of taxes for the payment of the debt of New Orleans shall be six hundred and fifty thousand dollars."

Under these acts, No. 71 and No. 72, the commissioners of the consolidated debt issued bonds of the city of New Orleans, known as consolidated bonds, to the amount of ten millions of dollars, in exchange for the bonds, obligations, and debts of the old city, of the three municipalities, and of the city of Lafayette. Of this amount over five millions of dollars of bonds have been paid by funds received under the tax levied pursuant to the provisions of the 37th section of act No. 71, and of the 5th section of act No. 72, beyond what was necessary to meet the annual interest. There remain outstanding unpaid over four millions of dollars of bonds, with interest since 1876. Of these bonds, with unpaid coupons, the relator owns upward of six hundred, each for the sum of one thousand dollars.

The petition of the relator refers to the acts No. 71 and No. 72 of 1852, and cites at length the sections mentioned. It also

alleges that the bonds issued under them were negotiable securities; that by reason of the provisions of the law for the payment of the interest and the gradual reduction of their number through a sinking fund, the bonds were negotiated at their par value or above it, and were distributed in the markets of Europe and of the United States in the due course of business as a secure, permanent, and trustworthy investment; that the free banks of the State were compelled to invest in them to secure the circulation of their bills, and that individuals and corporations did likewise with confidence in the provisions of section 37 of act No. 71, and section 5 of act No. 72, for the maintenance and enforcement of which the public faith of the State of Louisiana and of the city of New Orleans was inviolably pledged.

The petition then alleges that, in violation of the provisions of law mentioned, which constitute a contract with the bondholders, binding both upon the State of Louisiana and the city of New Orleans, the Legislature of the State, on the 12th of March, 1874, passed an act entitled "An act to postpone the levy and collection by the city of New Orleans of a tax for a sinking fund for the purchase of its bonds, to authorize the administrators of the city to modify the last budget and tax levy, and to repeal conflicting laws and penalties," the object of which was to relieve the authorities of the city, until December, 1876, from the duty of estimating, levying, and collecting any tax for a sinking fund for the purpose of purchasing any of the bonds issued under the acts mentioned.

The petition also alleges that, in further violation of the provisions of the act of 1852, and of the contract with the holders of the bonds, the Legislature, on the 6th of March, 1876, passed another act, designed, as stated in its title, to adjust, regulate, and provide for the bonded debt of the city of New Orleans, and authorize the exchange of its bonds for other bonds to be issued on the plan known as the premium-bond plan, the avowed object of which was to impair, if possible, the obligation of the contract between the bondholders and the city, and

Statement of the case.

divest the rights acquired by them under it, by prohibiting the city authorities from levying a tax in any year under the provisions of the acts of 1852, by shackling the judicial tribunals in the issue of process, and by repealing the provisions of that act. This seventh section is as follows:

"SEC. 7. *Be it further enacted, &c.*, That no tax for the payment of bonds or interest on bonds other than that authorized by the preceding sections [the premium bonds] shall be levied either for the year 1876 or any year or years thereafter by the city of New Orleans, and that all existing laws requiring or authorizing the city council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, be and the same are hereby repealed; and it shall be hereafter incompetent for any court to mandamus the officers of said city to levy and collect any interest tax other than that provided in this act, or, in case of such mandamus, by a receiver or otherwise, to direct the levy and collection of any such tax."

The petition then avers that these acts of the Legislature of Louisiana are in conflict with the Constitution of the United States in that they impair the obligation of the contract between the bondholders and the city; that nevertheless, the authorities of the city, its mayor and administrators, in disregard of the provisions of the acts of 1852, and in contempt of their duties and of the rights of the relator and other bondholders similarly situated, have refused to perform the duty imposed upon them by those acts for the years 1874, 1875, 1876, and 1877, to levy a special tax for the payment of the matured coupons and the purchase of bonds; that they have levied upon the property subject to the levy of such special tax for the payment of the consolidated bonds other taxes to meet other bonds issued by the city in disregard of the prohibitory clauses of section 37 of the act of 1852, and the moneys collected have been applied to the payment of those bonds and other illegal purposes; that the authorities of the city have been notified to levy the special tax required for the years mentioned, but they have refused to discharge their duty in that

particular, and, in place thereof, have sought by all sorts of frivolous and unfounded technicalities to contest the validity and integrity of the consolidated bonds; that the relator has demanded payment of the matured coupons held by it, which was refused, the city authorities answering that there were no funds out of which they could be paid; and that the city and the taxable real estate within its limits are liable for the payment of the matured coupons and for the purchase of said bonds, to the extent of $650,000 per annum, for the years 1874, 1875, 1876, and 1877, less coupons paid for 1874 and 1875.

The petitioner therefore prays for a writ of mandamus and injunction against the city authorities; the former, commanding them to levy the special tax of $650,000 for the years named; and the latter, enjoining them from levying any other tax on real estate within the limits of the city which is subject to the special tax for the consolidated debt until the special tax has been levied.

Upon the petition, an alternative writ of mandamus was issued, requiring the city authorities to show cause why they should not comply with its prayer.

The authorities appeared on the return day and excepted to the jurisdiction of the writ, on the following grounds:

1st. That by the provisions of the acts of the Legislature—(No. 5 of the extra session of 1870, and No. 31 of 1876)—the courts of the State were prohibited from issuing a writ of mandamus to compel the respondents to pay any debt not liquidated by judgment or to levy and collect any interest tax other than that provided in act No. 31 of 1876, (the premium-bond act.)

2d. That the duty of the respondents, by the city charter and the sixth section of the act No. 31 of 1876, was limited to the levy and collection of a tax on the assessed value of all property subject to taxation within the city, at a rate not exceeding one and one-half per cent. on the dollar, to meet all expenses of the city government, and to pay the interest on its bonded debt.

Statement of the case.

3d. That the respondents are expressly forbidden by act No. 31 of 1876 (the premium-bond act) from levying the tax demanded for the year 1876, or for any year afterwards.

4th. That the Legislature, by act No. 53 of 1874, had suspended the levy and collection of any tax for the sinking fund under the act of 1872 until December, 1876, which the respondents charge was passed with the assent of the Southern Bank.

And if the exceptions should be overruled, the respondents, reiterating and pleading the matters contained in them as part of their answer, further add:

5th. That the provisions of the thirty-seventh section of act No. 71 of 1872 are unconstitutional and void, because their object is not expressed in the title of the act, as required by article 118 of the Constitution of 1845 in force at the time.

6th. That the tax provided by the section mentioned is unconstitutional and void, and in violation of section 127 of the Constitution of 1845 and article 123 of the Constitution of 1852; because, first, it is to be assessed on real estate and slaves, and not on personal property; and secondly, because the rate per cent. of the tax in each municipality is to be in proportion to the indebtedness of each.

By a supplementary answer the respondents reiterated the same objections to the writ in more ample terms.

Various parties, including the State of Louisiana, holders of premium bonds, owners of real estate in the city, and taxpayers, were allowed to intervene under the practice which obtains in Louisiana, and various exhibits produced by them were made part of the case.

In March, 1878, the District Court gave judgment granting a peremptory writ of mandamus as prayed, and denying the injunction. On appeal to the Supreme Court of the State, this judgment was reversed, and judgment entered that the demand of the relator be dismissed, with costs, in both courts. To review this judgment the case is brought to this court.

E. Bermudez, John A. Campbell, D. H. Chamberlain, and *W. B. Hornblower,* for plaintiff in error.

B. F. Jonas and *Henry C. Miller,* for defendants in error.

FIELD, J.—As will be seen by the statement of the case, the petition for the mandamus proceeds upon the theory that the transaction authorized by the thirty-seventh section of the act of 1852 and the fifth section of the supplementary act of the same day, when consummated by the issue of the bonds of the city of New Orleans and their exchange for the obligations of the old city, of the three municipalities, and of the city of Lafayette, constituted a contract between the city and the bondholders, the obligations of which could not be subsequently impaired by State legislation, and that the provision pledging the levy and collection of an annual tax of $600,000, increased by the supplementary act to $650,000, for the payment of the interest on the bonds and their gradual retirement, was an essential part of that contract.

On the other hand, the city authorities, the respondents here, deny the validity of the act of 1852, on two grounds: 1st, that its object is not sufficiently expressed in its title, under the Constitution of 1845; and 2d, that in providing for a tax to be levied upon real estate and slaves, to the exclusion of personal property, and in proportion to the indebtedness of each municipality, it violates the Constitution of 1845, which requires equality and uniformity of taxation throughout the State. And they also invoke against the issue of the writ the subsequent legislation of the State limiting the taxes which shall be levied upon property in the city, prescribing the purposes to which they shall be applied, prohibiting the levy and collection of any other tax, and depriving the courts of the State of the power to issue a mandamus to compel them to pay any debt not liquidated by judgment, or to levy and collect any interest tax other that provided by the premium-bond act of 1876.

Assuming for the present that the act of 1852 is not invalid, for the reasons stated, the first inquiry is as to the character of the transaction authorized by it and the supplementary act. Did it, when consummated, amount to a contract between the city and parties subsequently taking the bonds, and did the pledge to levy the annual tax named form a part of the contract? Unless both of these questions can be answered in the affirmative, it will be to no purpose to inquire into the subsequent legislation of the State respecting the tax, as no inhibition would rest upon its power over the subject.

The acts of 1852 consolidated the three previously existing municipalities within the limits of New Orleans into one, and added to it the adjacent city of Lafayette. The new corporation took all the property and interests of the municipalities and of Lafayette, and consequently became subject to their obligations. The advantages which accrued from the possession of their property were accompanied with the burdens of their debts. This liability was not, however, left to rest upon any general principles of corporate liability in such cases. The Legislature recognized its existence, and in consolidating the municipalities and corporation of Lafayette, declared that the debts of the old corporation, of the municipalities, and of that city should be assumed and paid by the city of New Orleans, which was declared to be liable therefor. The first of the acts appointed commissioners of the debt thus consolidated, and authorized them to issue new bonds of the city having forty years to run, with interest coupons payable semi-annually, in exchange for the obligations and debts of the old corporation and of the municipalities, to which the debts of Lafayette were subsequently added by the supplementary act. To meet the interest, it provided that the common council of the city should annually, in the month of January, pass an ordinance to raise the sum of six hundred thousand dollars, increased to six hundred and fifty thousand dollars by the supplementary act, by a special tax on real estate and slaves, to be called the consolidated loan tax. It also provided that any

surplus remaining at the end of each year, after payment of the interest on these bonds and the expenses of managing the debt, should be applied to the purchase of such of the bonds as might have the shortest period to run. These provisions, until the bonds were accepted, were in the nature of proposals to the creditors of the old city, of the municipalities, and of Lafayette. The State in effect said to them: the city will give these bonds, running for the period designated, and drawing interest, in exchange for your demands; and as security for the payment of interest and the gradual redemption of the principal, the city shall annually, in January, levy a special tax for that purpose to the amount of six hundred and fifty thousand dollars. The provisions were designed to give value to the proposed bonds in the markets of the country, and necessarily operated as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand, the creditors surrendered their debts against the former municipalities; and, on the other hand, in consideration of the surrender, the city gave to them its bonds which carried the pledge of an annual tax of a specified amount for the payment of the interest on them, and ultimately of the principal. The annual tax was the security offered to the creditors; and it could not be afterwards severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued, or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions. (Van Hoffman *v.* The City of Quincy, 4 Wall., 535; Hartman *v.* Greenhow, 102

U. S., 679; People *v.* Bond, 10 Cal., 563; Brooklyn Park Company *v.* Armstrong, 45 N. Y., 235.)

There were other provisions in the act of 1852 besides those stated, which, though not essential to the obligatory form of the contract, were designed to inspire the creditors with confidence in the punctual payment of the interest and principal. It declared that all ordinances, resolutions, or other acts passed by the council after the first day of January of each year should be null and void, unless the ordinance imposing the consolidated loan tax should have been previously passed. It also declared that after its passage no obligation or evidence of debt of any description whatever, except those therein authorized, should be issued by the city or under its authority. Whatever legal force may be ascribed to them, they were intended as solemn asseverations that the pledge of the annual tax should never be violated.

The question then arises, was the act of 1852 valid? Its invalidity is asserted, as stated above, on two grounds, the first of which is that its object is not expressed in its title, as required by article 118 of the Constitution of 1845. The title of the act is "An act to consolidate the city of New Orleans, and to provide for the government and administration of its affairs." The article of the Constitution declares that "Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title." A similar provision is found in several State constitutions. Its object is to prevent the practice, common in all legislative bodies where no such provision exists, of embracing in the same bill incongruous matters having no relation to each other or to the subject specified in the title, by which measures are often adopted without attracting attention, which, if noticed, would have been resisted and defeated. It thus serves to prevent surprise in legislation. But it was not intended to forbid the union of several different provisions in the same bill if they are germane to the general subject indicated by its title. A bill to incorporate a city and provide for its government may, without conflicting

with the constitutional clause, contain provisions relating to the various subjects upon which municipal legislation may be required for the preservation of peace, good order, and health within its limits, the promotion of its growth and prosperity, and the raising of revenue for its government. So here, under the title of the act in question, provisions might be enacted, not merely relating to the union of the different municipalities and the government of the city, but to all the varied details into which the general administration of its affairs might lead. The municipalities were in debt at the consolidation, and this was well known to the Legislature. A change in their government and in the administration of their affairs required some disposition to be made of their debts. Whatever interests were possessed by them were the proper subjects of legislation in the act which took them out of existence as separate municipalities and created a new corporation in their place, with power to deal with their affairs. We hold, therefore, that the act of 1852 was not invalid on the ground that its object is not sufficiently expressed in its title.

The second ground of objection to the validity of the act of 1852 is, that the tax prescribed is to be levied upon real estate and slaves to the exclusion of personal property, and in each municipality in proportion to its indebtedness; which, as contended, violated the rule of equality and uniformity required by the Constitution of 1845. The language of the act is, that "The common council shall annually, in the month of January, pass an ordinance to raise the sum of $600,000 by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent. of said tax in each municipality shall be in proportion to the indebtedness of each." This amount, as already stated, was, upon the annexation of the city of Lafayette, increased to $650,000. On the passage of this act, February 23, 1852, the Constitution of 1845 was in force. The Constitution of 1852 was not adopted until July of that year. Article 127 of the Constitution of 1845 is as follows: "Taxation shall be equal and uniform throughout the

State. After the year 1848 all property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied; the Legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade, or profession."

This article has been frequently before the Supreme Court of the State for construction, and until the decision of the present case the requirement of equality and uniformity in the tax has been held to apply only to taxes levied for State and not to those levied for municipal purposes. The first case was that of the Second Municipality of New Orleans *v.* Duncan, 2 Ann., 182. That municipality had passed an ordinance imposing a special tax of one per cent. on all real estate within its limits, for the purpose of paying its debts and providing for the support of schools, and objection was taken to its constitutionality on two grounds: 1st, that the power of taxation was vested exclusively in the Legislature and could not be delegated to the municipality; and 2d, that the taxation authorized impinged upon the rule that no one species of property should be unduly assessed. Both grounds were supposed to derive support from the article of the Constitution in question, the first, because, as contended, the equality and uniformity required throughout the State were only obtainable by confining the exercise of the power of taxation to the Legislature, whose authority was co-extensive with the territorial limits of the State; and the second, from the inhibition against taxing one species of property higher than another. But the court replied, speaking through its chief justice: "The article by its terms applies to State, and not to municipal taxes. It provides for equality and uniformity of taxation *throughout the State.* * * * The framers of the Constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses, and their wants, and their corporate existence is recognized and continued, as to certain public

rights, by an express provision. The jurisprudence under which the present system of taxation had grown up was before them, and the power of remedying the evils of misgovernment was left in *statu quo*, with the Legislature; and the convention confined itself to providing for the State government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control." And referring to the admission made in the record that there was no special ordinance of the municipality assessing taxes on personal property, the court added: "We know of no reason imperative on the municipality to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance."

This case was decided in 1847, and it is objected that it arose before that part of the article went into effect which declares that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied." It is doubtful whether this objection be correct in point of fact; but assuming it to be so, the requirement of equality and uniformity was in force, and the part cited does not require that taxation shall be universal; it simply requires that when different kinds of property are taxed, the rate of taxation shall be the same on all. The construction given was afterwards affirmed by the same court, in Lafayette *v.* Cummings, 3 Ann., 672, which was decided in 1848. There the question was as to the validity of a municipal tax on the trade and occupation of the defendant as a butcher, levied under an ordinance of the city passed in 1847. There were other trades and occupations not embraced in the ordinance, and, consequently, not taxed. It was, therefore, contended that the imposition of the tax was contrary to that clause of the article of the Constitution which provides for the equality and uniformity of taxation throughout the State. But the court replied that

"in the case of Duncan *v.* 2d Municipality, this question, after very thorough argument, was determined by this court, and the article was held applicable only to State, and not to municipal taxes." It is said in answer to this decision that the language of the court was a mere dictum. We do not so regard it. The point of contention in the case was whether the equality and uniformity applied to taxation on occupations and trades as well as on property. The answer which met the objection to the taxation on real property exclusively was held to meet the objection to taxation on certain occupations to the exclusion of others.

The Constitution of 1852 contained a similar clause—identical in language, omitting the words "after the year 1848"—and with one exception, subsequently reversed, it has received a similar construction from the Supreme Court of the State. The case referred to was that of Municipality No. Two *v.* White and Others, which arose in 1854. (9 Ann., 446.) The municipality had imposed a tax on the owners of property contiguous to a newly-opened street, to pay the expenses of opening it, under a law which authorized the apportionment of the cost in such cases upon the owners of adjacent property according to the benefit derived from the improvement. The court was of opinion that the law was liable to the objection that the tax was not equal and uniform as required by the clause in question, and held it to be unconstitutional. The decision was in conflict with that in Duncanson's case, but it was rendered by a divided court; and in Yeatman *v.* Crandall, which arose in 1856, it was overruled. In the latter case the plaintiff sought to enjoin the collection of a levee tax which was imposed on certain alluvial lands, on the ground that the statute authorizing it was unconstitutional, in that it violated the rule of equality and uniformity prescribed by the article in question. But the court said: "This article refers to State taxation, in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform throughout the State it points directly to its object, which is to regulate the mode of filling the State

treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden. * * It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the Constitution infringed by such a state of things." (11 Ann., 220.)

By this decision the doctrine of the earlier cases upon the clause in the Constitution of 1845 was re-established; and one of the judges who had concurred in the decision in the White case stated that he had been led to reconsider his opinion, and that he yielded his former impressions on this point the more readily because the Supreme Court which sat under the Constitution of 1845, and five of the seven judges with whom he had sat upon the bench, had concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements.

The doctrine of this case was affirmed the same year in Surgi *v.* Snetchman and Surgi *v.* Batalord, 11 Annual, 357, and again in 1859 in Wallace *v.* Shelton, 14 Annual, 498. In its opinion, in the latter case, the court said that the questions in the Yeatman case were decided upon full consideration, after having the aid of the arguments of learned counsel in that case, and also in another case then under consideration on a rehearing, and were subsequently affirmed in the two cases mentioned, and added, that "after these decisions, which were in conformity with those under the Constitution of 1845, we had hoped the question would be considered as at rest."

The objection to the want of equality and uniformity in the taxation authorized by the act of 1852, in that it was to be levied on the property of the different municipalities in proportion to the indebtedness of each, does not strike us as possessing much force. The debts created by the municipalities were separate and different in amounts, and before the consolidation the taxes upon the property in them must necessarily have been assessed at different rates. There was no

obligation upon the Legislature to relieve either of them from the unequal burdens consequent upon the different amounts of their indebtedness. The subject was one resting in its discretion. Nor was it an unreasonable provision, when authorizing the city to issue its bonds for the indebtedness of them all, to require that taxation to raise the funds for their payment should be thus apportioned.

From the extended reference to the adjudications of the Supreme Court of Louisiana upon the Constitution of 1845 requiring uniformity and equality in taxation, there can be no serious question as to the validity of the act of 1852, so far as the consolidated bonds of the city of New Orleans are concerned, and the provisions made by it and the supplementary act for the annual levy of a tax of $650,000 to pay the interest and reduce the principal. The decisions upon the clause of the Constitution of 1852 are corroborative of the correctness of the construction originally placed upon the clause of the Constitution of 1845. Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it. (Christy *v.* Pridgeon, 4 Wallace, 197; Shelby *v.* Guy, 11 Wheaton, 367.) The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent con-

tracts. The doctrine on this subject is aptly and forcibly stated by the chief justice in the recent case of Douglas *v.* Pike County, 101 U. S., 686. "The true rule," he observes, "is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." (See, also, Gelpcke *v.* Dubuque, 1 Wall., 175; Havemeyer *v.* Iowa Co., 3 Wall., 294; Thompson *v.* Lee County, 3 Wall., 327; Lee County *v.* Rodgers, 7 Wall., 181; Chicago *v.* Sheldon, 9 Wall., 50; Olcott *v.* Supervisors, 16 Wall., 678; Fairfield *v.* County of Gallatin, 100 U. S., 47.)

We refer to this doctrine not from any doubt as to the correctness of the construction of the article of the Constitution of 1845 given by the Supreme Court of the State, but in answer to the objections of counsel and the position of the court below. We are of opinion that the construction given was correct. It is impossible to apply to the varying wants of a municipality the rule invoked with reference to taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied. The same construction of a similar clause in the constitutions of other States has been adopted by their highest courts. The Constitution of Virginia of 1850 prescribed that "taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which

shall be ascertained in such manner as may be prescribed by law;" and the Court of Appeals of the State held that the provision related solely to taxation for purposes of State revenue, and did not apply to taxes by counties and corporations for local purposes. (Gilkeson *v.* The Frederick Justices, 13 Grat., 577.) The Constitution of Arkansas of 1836 provided that "all property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the General Assembly shall direct—making the same equal and uniform throughout the State; and the Supreme Court of the State held that the provision was intended to apply to State revenue, and was not applicable to taxes levied for county purposes. (Washington *v.* The State, 13 Ark., 761; see, also, McGehee *v.* Mathis, 21 Ark., 40.)

That taxation for State purposes, to be equal and uniform within the meaning of the Constitution of 1845, need not have been universal, is a proposition which calls for no argument. It was only necessary that all property on which taxes were levied—not all property in the State—should be taxed according to its value, and in conformity with some fixed rate or mode. (State *v.* Lathrop, 10 Ann., 398; New Orleans *v.* Commercial Bank, Id., 755.)

The validity of the consolidated debt of New Orleans and the obligation of the city to provide for the payment of the interest and the redemption of the principal were never questioned by the legislative department of the State until 1876, but were repeatedly and in the most emphatic manner recognized and affirmed. In fourteen acts of the Legislature, passed prior to that year, the consolidated bonds are referred to as valid obligations of the city, though in one of them, it is true, a different mode of raising the tax from that specified in the act of 1852 is required, and in another the levy and collection of the tax are postponed for two years. Thus the act passed in 1856, amending the charter, provides that the common council shall in each year levy an equal and uniform tax upon all property in the city, real and personal, but that said tax, added

to the consolidated loan tax and other taxes designated, shall not in the aggregate be more than one dollar and a half on one hundred dollars of valuation, except in case of invasion, "provided it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the city of New Orleans." In the mode thus prescribed the amount stipulated by the act of 1852 was annually raised and applied until 1874, without objection from the bondholders. Hence it is contended that they waived their right to the special tax mentioned. But no such inference can be justly drawn from their silence. They could not complain so long as the amount prescribed was raised and applied as stipulated. Had the requisite funds been given to the city, and then applied to pay the interest on the bonds and to purchase with the residue such of them as had the shortest time to run, the bondholders would have been equally without cause of complaint, and would as little have waived by their silence the right to insist upon the special tax if a resort to it should become necessary. Nor is their right in that respect affected by the fact that since 1852 slavery has been abolished, and that there are no longer slaves upon whom taxation can be levied. The obligation of the city to raise the required fund by special tax on real estate still remains. That is no more lessened than it would be by the destruction of any other portion of the taxable property; although the rate of taxation on what is left might be thereby increased.

The act of 1874, which postponed the levy and collection of the tax for a sinking fund for the purchase of bonds of the city until December, 1876, also declared that the act should in nowise be construed to hinder, delay, or affect the prompt payment of the interest on them as they matured. The validity of the consolidation bonds was "recognized in all its integrity, it being the object of the act to afford temporary relief to the tax-payers of New Orleans in the embarrassed condition of its affairs, and not to detract from or impair the rights of the holders of said bonds."

But notwithstanding this declaration of the validity of the consolidated debt, and the inviolability of the provisions for its payment, no tax was subsequently raised to pay the interest or to retire the principal. And before the time arrived to which the postponement of a levy was made, new light respecting the obligations of the city and the rights of the bondholders had dawned upon the city authorities. Although for twenty-two years all departments of the State government had recognized the validity of the bonds, and the annual interest had been regularly paid, and more than half of them retired, it was then for the first time discovered that the act of 1852, authorizing the issue of the bonds, was invalid; that its object was not sufficiently stated in the title; that the tax prescribed was neither equal nor uniform, and therefore was in conflict with the Constitution. The outcome of these new motions was the premium-bond act of March 6, 1876, passed by the Legislature at the solicitation of the municipal authorities.

This act is a most remarkable piece of legislation. So far as the consolidated bonds are concerned it amounts to little less than open repudiation of the city's faith. It admits that the debt of the city as established by law is so large as to require for its liquidation taxation on property within its limits at the rate of at least five per cent., and yet authorizes a tax of only one-and-a-half per cent. to pay the expenses of the city government and to meet the obligations which are offered in exchange for those bonds.

It recites in its preamble that the total debt of the city, bonded and floating, exceeds $23,000,000; that the taxable property of the city has become so reduced in value as to require a tax at the rate of at least five per cent. per annum to liquidate the debt; that the levying of a tax at so exorbitant a rate will render its collection impossible; that the continuation of a tax beyond the ability of the property to pay would lead to a further destruction of the assessable property of the city and to ultimate practical bankruptcy; and that the council of

the city have adopted a plan for the liquidation of its indebtedness, looking to the payment of its creditors in full, "obtaining thereby the indulgence necessary for the public well-being and the maintenance of the public honor."

The plan proposed was to exchange all recognized and valid bonds of the city of New Orleans and of the cities of Jefferson and Carrollton for bonds to be known as premium bonds of the city; the latter to be of the denomination of twenty dollars, and dated September 1, 1875, each bearing five per cent. interest from July 15 of that year, the interest and principal to be paid at the same time and not separately, and that time to be determined by chance in a lottery. One million of these bonds was to be divided into ten thousand series of one hundred bonds each. The ten thousand series were to be placed in a wheel, and, in April and October of each year, as many series were to be drawn as were to be redeemed, according to a certain schedule adopted. The bonds composing the series thus drawn were to be entered for payment three months thereafter, principal and interest, and were to be receivable for all taxes, licenses, and other obligations of the city. At the expiration of the three months the bond numbers of the drawn series were to be placed in a wheel, and 1,176 prizes, amounting to $50,000, were to be drawn and distributed. Under this plan the city was to be released from payment of the principal and interest of its debt, except such portion as might be drawn in the lottery each year. Under this arrangement it would depend upon the turn of a wheel and the drawing of a fortunate number whether a creditor would be paid in one year or in fifty years. The plan completely disregards all the conditions upon which the consolidated bonds were issued, and postpones indefinitely the payment of interest and principal, or rather leaves the time of payment within fifty years to be determined by chance.

The act of 1852, as we have stated, declares that the city council shall, in January of every year, pass an ordinance for

the levy and collection of a special tax to be applied to the payment of the interest on the consolidated bonds and to retire the principal. The act of 1876 declares that no tax shall be levied by the city council, that year or any year afterwards, to pay the principal or interest on those bonds or on any other than the premium bonds. The act of 1852 declares that all ordinances, resolutions, and acts of the city council of any year shall be null and void unless the ordinance imposing the special tax designated shall have been previously passed. The act of 1876 declares that all laws requiring or authorizing the city council to levy any tax for bonds or interest on bonds other than premium bonds are repealed; and, as if that was not sufficient evidence of the repudiation of former obligations, it forbids the courts to issue a mandamus to the officers of the city to levy and collect any interest tax other than for those bonds.

To meet the interest on them and for all other purposes of the city, the act further provides that a tax of only one and one-half per cent. per annum shall be levied; and this limitation of the taxing power of the corporation is "declared to be a contract not only with the holder of said premium bonds, but also with all residents and tax-payers of said city, so as to authorize any holder of said premium bonds to legally object to any rate of taxation in excess of the rate herein limited."

If the provisions of this act, nullifying the pledges of the act of 1852, are valid, the consolidated bonds are virtually destroyed; no taxation is allowed to raise funds for them; their payment, therefore, would be so uncertain as to render them practically valueless. The chance with premium bonds offered in their place of a favorable turn of the wheel in a lottery would be a poor substitute for the levy of an annual tax for the payment of interest and principal. We shall not waste words upon the scheme thus developed to evade the just obligations of the city. Notwithstanding the declaration in its preamble that the act seeks from the creditors the indulgence

necessary "for the public well-being and the maintenance of the public honor," it is, so far as the consolidated bonds are concerned, tainted with the leprosy of repudiation. It says to the creditors: "Take these premium bonds, and trust for payment within fifty years to your fortune in the lottery we offer; no other way is left open to obtain a possible payment. No tax can be levied for your benefit. No compulsory writ can issue from the courts. Take these bonds or take nothing." The primal duty of the city authorities to fulfill punctually their obligations and maintain good faith is thus proclaimed to be no duty at all.

We do not deny that the power of taxation belongs exclusively to the legislative department of the government; that the extent to which it may be delegated to municipal bodies is a matter of discretion; and that in general the power may be revoked at the pleasure of the Legislature. But, as we said in the case of Wolf *v.* New Orleans, decided at the last term, legislation revoking the power is subject to this qualification, which attends all State legislation, that it "shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result; not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. * * * * However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subor-

dination to the principle which secures the inviolability of contracts."

The case of Von Hoffman *v.* The City of Quincy, reported in 4th Wallace, is a leading one on this subject. The court there said, "that when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation in such cases are equally bound."

The inhibition upon the courts of the State to issue a mandamus for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium-bond plan was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made the writ was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy, existing when a contract was made, is permissible, without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of mandamus. The holders are denied all remedy. (Louisiana *v.* New Orleans, 102 U. S., 203–207.)

Legislation of a State thus impairing the obligation of contracts made under its authority is null and void; and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed. The act of March, 1876, cannot, therefore, be permitted to restrict the power of the city authorities to levy the tax stipulated by the act of 1852 to pay the interest on the consolidated bonds issued thereunder and to retire the bonds.

It follows from the views expressed that the judgment of

the Supreme Court of the State of Louisiana must be reversed, and the cause be remanded to that court with instructions to reinstate the same, and to remand it to the Third District Court of the parish of Orleans, or its successor, to carry into effect the provisions of the thirty-seventh section of the act of the Legislature approved February 23, 1852, and the fifth section of the supplementary act approved the same day, embraced in Nos. 71 and 72 of the acts of that year, as containing a valid contract between the city of New Orleans and the creditors holding the bonds issued under them; and to direct the District Court to issue a mandamus to the city of New Orleans and its authorities annually to levy and collect the tax of six hundred and fifty thousand dollars directed by the acts, and to apply the same in the following order: first, to the payment of the current interest of the year; secondly, to the payment of arrearages of interest of former years, until all the arrearages are satisfied; and thirdly, to the purchase of bonds having the shortest period to run.

Judgment to this effect, and that the defendants pay the costs in this court and in the Supreme and District Courts of Louisiana, will be entered.

REVERSED.

THE NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA v. ALBERT SCHEFFER, GEORGE R. FINCH, AND CHARLES NELSON, AS EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF CHARLES SCHEFFER, DECEASED.

April 24, 1882.

A record of a case simply showing a verdict and motion for new trial overruled, but no judgment on the verdict, shows no such final judgment as is reviewable.

ERROR to the Supreme Court of the State of Minnesota.

Isaac N. Arnold and *Van H. Higgins*, for plaintiff in error.

E. C. Palmer, for defendants in error.

Opinion of the court.

WAITE, C. J.—A majority of the court is of opinion that there has been no final judgment below in this case. Upon the trial in the District Court of Ramsey county a verdict was rendered in favor of the plaintiff. Before any judgment was entered on this verdict, a motion was made for a new trial. This motion was overruled, and thereupon an appeal was taken to the Supreme Court of the State from "the order * * * denying the application for a new trial." The judgment on this appeal is as follows: "Pursuant to an order of court duly made and entered in this cause on the 21st of March, 1879, it is here and hereby determined and adjudged that the order herein appealed from, to wit, of the District Court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is in all things, affirmed." Then follows a judgment for costs in the Supreme Court. No further proceedings appear to have been had in either court, and the record consequently shows a verdict and motion for new trial overruled, but no judgment on the verdict. It follows that the writ of error must be dismissed.

So ordered. DISMISSED.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY v. EDWARD N. STANLEY.

April 3, 1882.

1. The act of 1866 of the New York Legislature imposing a tax on bank shares, but not allowing the shareholder to deduct from his shares the amount of his debts, as was allowed the owner of all other personal property by the act of 1850, is to that extent, in so far as it applies to stockholders of national banks, in conflict with the national banking act, and unconstitutional.
2. It is not, however, absolutely void, but is void as against the act of Congress only in cases where some one was injured by the particular matter in conflict. Those portions of it which are valid are separable from those which are invalid. Even as regards national bank stock, it is valid as to holders who owe no debts, and only voidable as to those who are indebted, and stands as against them until, by taking the steps required by the State law, they prove themselves entitled to the reduction.
3. Hence the case at bar was reversed and remanded, with permission to the inferior court in its discretion to allow amendments and to hear evidence tending to prove a practice of the tax assessors to assess national bank stock higher than other moneyed property.

ERROR to the Circuit Court of the United States for the Northern District of New York.

W. H. Peckham and *R. W. Peckham*, for plaintiffs in error.

Matthew Hale, *George F. Edmunds*, *Wager Swayne*, and *Julian T. Davis*, for defendant in error.

MILLER, J.:—This is a writ of error to the Circuit Court for the Northern District of New York, in which Stanley, the defendant in error, recovered a judgment against plaintiffs in error for taxes exacted and paid under legal process on shares of the stock of the National Albany Exchange Bank. A large number of the shareholders of the bank who had paid this tax made an assignment of their claims to Stanley, and he recovered a judgment in the action for the sum of $61,991.20, with interest and costs.

The ground of this recovery was that the statute of New

York, under which the shares of the bank were assessed, was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of the shares of the stock owned by him, in ascertaining the amount for which the shares should be taxed.

The pleadings in the case set out the sums paid by the stockholders and their names, and their assignment to Stanley, the payment under compulsion of legal process, and a demand for the repayment on the Albany county authorities.

The case was submitted to the court on a waiver of trial by jury, and, on the finding of facts and conclusions of law thereon by the court, judgment was rendered for plaintiffs. The facts found by the court are thus stated:

"*First.* That the allegations of the complaint in regard to the citizenship of the plaintiff; the citizenship and powers and liabilities of the defendant; the organization and capital of the National Albany Exchange Bank; the ownership of the shares of capital stock of the National Albany Exchange Bank; the assessment of the stockholders in said bank, named in said complaint, by the board of assessors of the city of Albany; the names and residences of said stockholders; the collection of taxes from said stockholders, and the payment of the same to the county treasurer of the county of Albany, and the demand made by Chauncey P. Williams, before the commencement of this action, of the treasurer of the county of Albany, are true as therein set forth.

"*Second.* That the amounts collected from the said stockholders and paid to the treasurer of the county of Albany, and the times when the said amounts were so paid to said treasurer, were as follows, to wit:

$907 90 paid	August	11, 1874
127 84 paid	August	11, 1874
1,868 06 paid	May	1, 1875
1,409 33 paid	May	27, 1876
1,202 32 paid	May	3, 1877
1,336 60 paid	April	17, 1878

$1,473 02	paid	April	22, 1879
11,604 75	paid	May	1, 1875
8,147 26	paid	May	27, 1876
7,822 34	paid	May	3, 1877
7,357 94	paid	April	16, 1878
6,243 20	paid	April	21, 1879

"*Third.* That the sums above named were not paid voluntarily by said stockholders, but were forcibly collected by the marshal of the city of Albany, under a warrant issued to such marshal by the receiver of taxes of said city, pursuant to a warrant issued to said receiver of taxes by the board of supervisors of the county of Albany, by levying upon the property of the said stockholders respectively, as alleged in said complaint.

"*Fourth.* That the said assessments were made and said amounts collected and received by the treasurer of the county of Albany, as above stated, under color of an act of the Legislature of the State of New York, entitled 'An act authorizing the taxation of stockholders of banks and surplus funds of savings banks,' passed April 23, 1866, being chapter 761 of the Laws of 1866, and not otherwise.

"*Fifth.* That the allegations of the complaint with reference to the assignments by the respective stockholders of said bank of their claims against the county of Albany, by reason of the matters alleged in the said complaint, are true as set forth in said complaint, and that the plaintiff, at the time of the commencement of this action, was the holder and owner of all claims against the county of Albany, or against the defendant, arising out of the matters alleged and set forth in said complaint.

"*Sixth.* That the said act of the Legislature of the State of New York, chapter 761 of the Laws of 1866, did not permit the deduction of debts owing by the owners of stock in banks or banking associations, in the assessment thereof for taxation, although such deduction of debts of the owner was, at the time of the assessments alleged in the said complaint,

permitted and required by the laws of the State of New York to be made from the value of every kind of personal property and moneyed capital, other than bank stock, in assessing the same for the purpose of taxation.

"*Seventh.* That the allegations in the fourth count of said complaint, as to the presentation to the said board of assessors by said Chauncey P. Williams of the affidavit of his indebtedness, and the request by him for a reduction of his assessment on his bank stock, and the refusal of said board of assessors to make such reduction, and the application by said Williams to the Supreme Court of the State of New York for a writ of mandamus, and the subsequent legal proceedings thereon, including the decision of the Supreme Court of the United States, are true as set forth in said fourth count."

It does not appear by this finding of the court that any shareholder, for whose payment of taxes this suit is brought, made affidavit or other application in regard to his indebtedness, that it might be deducted from his assessment, nor that any of these shareholders owed anything to be deducted from the assessed value of the shares held by them, except the seventh finding of facts in regard to C. P. Williams.

Unless, therefore, the other shareholders who paid the tax on the shares of their stock were entitled to recover back the sum paid without any evidence that they had made affidavit of the amount which they would be entitled to deduct from the assessment of their shares, if the same rule had been applied to assessment of bank shares as to other personal property, and without any evidence that they owed anything whatever to be deducted from any assessment of their personal property, including bank shares, the judgment in this case cannot be supported.

The judge who decided the case on the circuit found as a conclusion of law that the assessment of all shares of national banks was void, because the statute of New York, under which the assessments were necessarily made, was void, as being in conflict with the act of Congress on that subject, and he de-

clares, in an opinion delivered in the case of the National Albany Exchange Bank *v.* Hills, receiver of taxes, in a chancery suit, that the assessments in this class of cases are absolutely void, the assessors having acted without any jurisdiction.

If this view of the subject be sound; if the officers who assessed and collected this tax were utterly without authority to collect any tax whatever, or if there was no law by which in any case they could assess and collect tax on shares of national banks, then it is of no consequence to inquire of anything beyond the fact that plaintiff's assignors did pay such a tax under legal compulsion.

On the other hand, if the law is for any purpose a valid law, and if it can be held to furnish the rule of taxation as to any class of owners of national bank shares, then the onus is on plaintiff to show that his assignors are not of that class.

The question here to be decided arises under two statutes of the State of New York in regard to taxation.

The first of these is the act of 1850, relating to the assessment and collection of taxes in the city of Albany. The sixth section of the act requires the board of assessors to prepare an assessment roll, in which there shall be set opposite the name of each tax-payer (1) all his real estate liable to taxation and its value, and (2) the full value of all his personal property after deducting the just debts owing by him.

Section 9 of the act is as follows:

"If any person shall at any time before the assessors shall have completed their assessments make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit and no more."

In 1866 the State enacted a law concerning the taxation of

bank shares which was evidently intended to meet the requirements of the act of Congress in relation to State taxation of the shares of national banks, and the provision of this statute related only to taxing stockholders in banks, and to the capital invested in individual banks. The first section of this act reads as follows, and it contained no other provision for deductions as the basis of taxation, except what is found in this section:

"No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere; whether the said stockholder reside in said place, town, or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by such bank or banking association; but the same shall be subject to State, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

In the case of The People *v.* Dolan, 36 N. Y. R., 59, the question was whether, taking these two statutes together, an owner of shares of stock in a national bank was entitled to deduct from the assessed value of his shares the just debts

owing by him. It was argued that into this act of 1866 for the taxation of bank shares there should enter as part of it the provision of the act of 1850 which allowed this deduction as to all personal property, and that nothing in the act of 1866 forbade this, or was inconsistent with it. It was also insisted that unless the act of 1866 was so construed it would violate the act of Congress, which only permitted the shares of national banks to be taxed at the same rate as other money capital of the citizens of the State.

But the Court of Appeals overruled both propositions, and held that the true meaning of the act of 1866 was that no such deduction should be made, and that as thus construed it was not in conflict with the act of Congress on that subject.

In the subsequent case of Williams against Weaver, Williams, who was a shareholder in the National Albany Exchange Bank, made the affidavit required by section 9 of the act of 1850, and, presenting it to the board of assessors of the county, demanded a reduction in accordance with it from the valuation of his bank shares. On the refusal of the assessors to comply with this request, a proceeding was commenced in the courts of the State, in which the Court of Appeals reaffirmed the principles of the case of The People *v.* Dolan. That case coming into this court by writ of error, it was here held that while we were bound to accept the decision of the highest court of the State in construction of its own statute, the act of 1866 as thus construed was in that particular in conflict with the act of Congress, because it did tax shares of the national banks at a higher rate than other moneyed capital in the State. In that case, reported in 100 U. S. R., 539, there are no words which declare the act of 1866 to be void, but the careful language of the decision is, that "in refusing to plaintiff the same deduction for debts due by him from his shares of national bank stock that it allows to others who have moneyed capital otherwise invested, it is in conflict with the act of Congress."

Accepting, therefore, as we must, the act of 1866, as construed by the Court of Appeals of New York, as not author

izing any deduction for debts by a shareholder of a national bank, is it for that reason absolutely void? This cannot be true in its full sense, for there is no reason why it should not remain the law as to banks or banking associations organized under the laws of the State, or as to private bankers, of which there no doubt exists a large number of both classes.

What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Are courts to sit and decide abstract questions of law in which the parties before the court show no interest, and which, if decided either way, affects no right of theirs?

It would seem that if the act remains a valid rule of assessment for shares of State banks and for individual bankers, it should also remain the rule for shareholders of national banks who have no debts to deduct, and who could not, therefore, deduct anything if the statute conformed to the requirements of the act of Congress.

It is very difficult to conceive why the act of the Legislature should be held void any further than when it affects some right conferred by the act of Congress. If no such right exists, the delicate duty of declaring by this court that an act of State legislation is void, is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit.

The general proposition must be conceded, that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.

Opinion of the court.

In the case of The Railroad Companies *v.* Schutte, 103 U. S., 118, decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. "It is contended," said the court, "that as the provision of the act in respect to the execution and exchange of the State bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void, and must fall. We do not so understand the law." And yet this was a case in which the scheme of exchanging the bonds of the State for the bonds of the company, in order that the company might get the benefit of the better credit of the State, was accompanied by a mortgage created alone by the statute in favor of the State as her security; and the court, while holding that the exchange of bonds was void as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid.

The language of this court in the two cases cited in the brief, of The United States *v.* Reese, 92 U. S., 214, and The Trade-Mark Cases, 100 U. S., 82, concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so. Said the court in the latter case: "While it may be true that when one part of the statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each may stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear." * * * The case of The United States *v.* Reese also implies that there may be unconstitutional provisions which do not vitiate the whole statute or even a single section, because the argument is to show that in that case there could be no separation of the good from the bad. It is also to be observed that in both these cases it was a statute creating and punishing of-

fenses criminally which was to be construed in regard to the limited constitutional power of Congress in criminal matters.

The case of The State Freight Tax, 15 Wall., 432, arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company doing business within the State. The railroad companies, who contested the tax, presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. This court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void. It said: "It is not the purpose of the law, but its effect, which we are now considering. Nor is it all material that the tax is levied upon all freight, as well as that which is wholly internal as that embarked in interstate commerce. * * * The conclusion of the whole matter is that, in our opinion, the act of the Legislature of Pennsylvania of August 25, 1864, *so far as it applies to articles* carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void." The same language is repeated in The Erie Co. *v.* Pennsylvania, decided at the same time, and both cases were remanded to the State court for further proceedings in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State and not on interstate commerce.

This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.

But in a review of the cases in this court on this subject, that of Austin *v.* The Aldermen of Boston, 7 Wall., 694, will be found most nearly to resemble the one before us. It related to the same matter of the invalidity of a statute of a State

taxing shares of the national banks as being in conflict with the act of Congress. That act said that such taxes might be assessed *at the place where said bank was located, and not elsewhere.*

The act of the Massachusetts Legislature directed the assessment and taxation of the shares at the *place where the owner resided.* The plaintiff in error, Austin, having contested the tax on his shares in the courts of the State unsuccessfully, brought the case here by writ of error. This court declined to enter upon the question of the validity of the Massachusetts statute, because the case did not show that Mr. Austin was taxed on his shares in any other place than Boston, the place where the bank was located.

The argument of counsel in the case before us is that any tax, or a tax on any person on account of his bank shares, is void because the whole of the New York statute is void. If the argument is sound, it was equally applicable to Austin's case.

The statute of Massachusetts, which made no limitation of taxation to the place where the bank was located, must be held void under any principle which would wholly invalidate the statute of New York, because it did not allow the deduction of the owner's indebtedness from his shares; and if the Massachusetts statute was utterly void as to national bank shares, then the tax on Mr. Austin's shares in Boston was void, and he had *a right to be protected* against the unconstitutional statute. The court evidently went upon the principle that the statute was only void as against the act of Congress, in cases where some one was injured by the particular matter in which there was such conflict. The case seems to us directly in point.

To the same effect are the cases of People *v.* Bull, 46 N. Y. R., 46; Gordon *v.* Carnes, 47 N. Y. R., 608; *ex parte* Village of Middleton, 81 N. Y. R., 196.

If we examine the statute before us on principle, we shall find but little reason to hold it to be wholly void as regards bank shares. If the statute stood alone, there is nothing in it in conflict with the act of Congress. It is only when we look to the other statute, which prevents the deduction of debts from the

entire value of personal property, that we discern the discrimination against bank shares. The act declares that bank shares shall be taxed according to their value, after deducting the real estate and other property on which the bank itself pays tax. This is eminently just. It provides for a mode of ascertaining their value, the officers who shall do it, and how the tax shall be collected. In all this the law is valid, except that it does not authorize a deduction for debts of the shareholder. This is a distinct and separable principle. When the shareholder has no debts to deduct, the law provides a mode of assessment *for him* which is not in conflict with the act of Congress, and the law in that case can be held valid. Under the decision in Austin *v.* The Aldermen, it is valid as to him.

If he has debts to be deducted, the case of Williams *v.* Weaver shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured the remainder of the law remains valid. In other words, in such a case so much of the law as conflicts with the act of Congress in the given case is held invalid, and that part of the State law which is in accord with the act of Congress is held to be the measure of his liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and to those to which it does, between the cases in which it violates the act of Congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts.

It follows that the assessors were not without authority to assess national bank shares; that where no debts of the owners existed to be deducted the assessment was valid, and the tax paid under it a valid tax; that in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some

proper manner that the shareholder owed just debts which he was entitled to have deducted.

If they then proceeded in disregard of the act of Congress, the assessment was erroneous, and the case of Williams *v.* Weaver shows how that error could be corrected.

The case before us shows no error in any case but that of Mr. Williams, and in that case he has obtained the judicial decision of this court, that the tax he paid was illegally exacted from him. Nor do the facts of his case raise the question whether, in a case where the debts of the shareholder do not equal the assessor's value of his shares, the tax is wholly erroneous, or only so much as represent the assessment of his indebtedness that should have been deducted, for his affidavit was that his debts equaled the value of his bank shares. Nor do the findings of fact raise the question whether, without making affidavit and demand on the assessors, a suit can be maintained to recover, when such indebtedness actually existed; for he did make affidavit and demand, and no other taxpayer has shown any such notice or demand, or that he had any indebtedness to be deducted. There is neither finding of fact nor averment in the pleadings on either point as to any other assignors of plaintiff than Mr. Williams. It results from these considerations that the judgment of the Circuit Court is reversed, and that on the finding of facts judgment should be rendered for plaintiff on the fourth count for the amount of the tax paid by Williams, with interest, and on all the other counts for defendants.

It is so ordered.

BRADLEY, J. (dissenting.)—I dissent from the judgment of the court in all these cases, for the reason that, in my opinion, the State laws authorizing the capital stock of national banks to be taxed, without allowing any deduction for the debts of the stockholders, where such deduction is allowed in relation to other moneyed capital, are void *in toto* so far as relates to national banks. To hold the laws valid except as to those

who are actually indebted, and actually claim the benefit of the deduction, and actually set it up in a suit brought by the bank for relief, is practically to render the condition of the act of Congress nugatory, and to deprive the national banks and their stockholders of its protection. The tax, though laid on the stockholders, is required to be paid by the bank itself, which must pay without deduction unless the shareholders give the bank notice of the amount of their debts. This is a most ingenious expedient to avoid such deductions altogether. The probability that not one in ten of the shareholders will ever have notice of the assessment in time to make the claim, and the natural reluctance they would have, if they had notice, to lay the amount of their debts before a board of bank officers, will effectually secure the State from claims for deduction. And that was, no doubt, the object of the law. But this unequal operation of it, in its practical effect, might not be sufficient to render it void. It is void, in my judgment, because its makes no exception, but is general in its terms, subjecting to taxation the capital stock of national banks without the privilege of deducting debts. Denying to it operation and effect as to those who desire to claim the benefit of the deduction, and giving it effect as to all others, is to tear a portion of the law out by the roots. *It is not like the case where a portion of a law which may be separated from the rest can be declared invalid, without affecting the remainder of the law; nor like the case of a general law which the Legislature has power to make, but from the operation of which some individuals may have a legal or constitutional exemption, which they can plead in their defense;* but it is wrong in form, wrong *in toto.* The Legislature had no authority or power to make the capital of national banks taxable except in the same manner as other moneyed capital of the State. The practical iniquity of the law is seen in this, that it affects the value of all the stock whoever holds it. As the law stands it acts as a prohibition against the purchase of the stock by those who owe debts, and they constitute a considerable portion of every community. It does not help the valid-

ity of the law for us to declare that it is *pro tanto* void and, in fact, make a new law for the State. Its validity must be decided by its actual form and terms. If these cannot stand, the law is void.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY v. EDWARD N. STANLEY.

April 24, 1882.

ERROR to the Circuit Court of the United States for the Northern District of New York.

MILLER, J.—Since the opinion in this case was delivered a suggestion has been made to modify the order of the court for judgment so far as to permit a trial in the Circuit Court on issues not decided by that court in the former trial.

The conclusions of law found by the Circuit Court, if sound, disposed of the whole case, and the facts found were sufficient to meet that view. As our opinion differed in one important point from that on which the Circuit Court acted, it became a question whether the facts found were still sufficient to dispose of the whole case.

In a bill of exceptions, signed by the judge and found in the record, it is said: "There was evidence given in the case upon the subject of other allegations contained in the complaint, but the court did not pass upon such allegations, as the following admission and the decision of the court herein duly show." Then follows a stipulation, signed by counsel for each party, that the case was decided solely upon the invalidity of the New York statute, and that other allegations contained in the complaint had not been passed on.

Under these circumstances we should have little difficulty in directing the court below to grant a new hearing as to such issues, if we could find in the record any material issue in regard to which the court made no finding.

Attention has been called to the following language, which is a part of each count in the complaint:

"And the plaintiff also says upon information and belief that the assessment of said shares of stock in said banking association by said board of assessors was at a greater rate than was assessed by said board of assessors upon shares of stock in a bank organized under the laws of the State of New York, located in said Sixth ward, and was at a greater rate than was assessed by said board upon other moneyed capital in the hands of individual citizens of the State of New York, and that for these reasons said assessment of said shares of stock and the levy of tax thereunder were illegal and void."

If this is a *sufficient* allegation of a distinct ground of recovery, it seems just that the plaintiff should have a hearing on it, as the defendant took issue on it and it has not been disposed of.

We have, however, much difficulty in finding a solid ground of recovery in this statement. It is divisible into two parts: 1. That the shares of the national bank were assessed at a greater rate than was assessed on shares of a bank organized under the laws of the State of New York, located in said Sixth ward.

We are quite clear that the shares of the plaintiff are not relieved from taxation because a single bank of the State has been favored by mistake or by intention.

For errors of this kind the statutes of New York provide the correction, which should be taken in time, and we should be very reluctant to hold that when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated.

The other branch of the allegation is that the assessment of the shares of the Exchange Bank "was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of New York."

If by this it is supposed that a few individual instances may be shown of partial assessments favoring citizens as compared with the national banks, we think it is erroneous. But

if it is intended to allege that apart from the question of the right of the shareholder to deduct for his debts—a question which, in this case, *was disposed of* and was in issue—it can be proved that the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher in proportion to their actual value than other moneyed capital generally, then there is ground for recovery, and a hearing as to that should be granted.

As we have said, it may be well doubted if plaintiff intended to allege this, or to rely on proving it.

But as it is a question of pleading under the New York code, and as no injustice can occur by leaving the matter to the court below, the judgment will be so far modified as to permit the court below, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleading to present it properly.

REVERSED.

CHARLES A. HILLS, RECEIVER OF TAXES, AND MICHAEL E. HIGGINS, MARSHAL OF THE CITY OF ALBANY, v. THE NATIONAL ALBANY EXCHANGE BANK.

April 3, 1882.

1. Supervisors of Albany County *v.* Stanley, *ante*, p. 543, followed.
2. A party who makes affidavit under the act of New York of 1850 that the value of personal estate owned by him is only slightly in excess of his debts, and demands of the tax assessors that the debts due by him be deducted from the valuation placed on his national bank stock, is, on their refusal, entitled to an injunction restraining them from collecting the illegal excess in his taxes caused by the improper valuation of his bank stock.
3. And where the fact is clearly established from the general course of dealing of the assessors that such affidavit and demand would have been unavailing, the necessity of making it is dispensed with.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

Counsel same as in preceding case.

Opinion of the court.

MILLER, J.—This is an appeal from a decree in chancery of the Circuit Court for the Northern District of New York, and it presents very much the same questions that have just been decided in the case of the Supervisors of Albany County against Edward Stanley. That was a common-law action to recover for taxes unlawfully exacted for years prior to 1879 on shares of the National Albany Exchange Bank, and the present suit was brought to enjoin the appellants from collecting a similar tax assessed and yet unpaid for that year. In this case the bank sued in right of and as representing all the stockholders, and the Circuit Court made a decree perpetually enjoining the collection of all taxes on shares of said bank. Several questions are raised, or rather suggested, which we think have heretofore been decided by this court, such as the right of the bank to maintain a suit on behalf of its shareholders. This was established by the cases of Cumming *v.* National Bank, 101 U. S., 153, and Pelton *v.* Same, 143. There is, also, an attempt to show that there was a settled rule or purpose on the part of the assessors to value the shares of the appellee bank higher in proportion to their real value than in the case of other banks, bankers, and moneyed corporations. We think the proof fails to establish this in a manner to justify the interference of a court of equity. (National Bank *v.* Kimball, 103 U. S., 732.)

The bill, however, in its main feature, asserts the right to an injunction on the ground that the act of 1866, under which the bank shares were assessed, is absolutely void because it makes no provision for deduction from the assessed value of these shares of the debts honestly owing by the shareholders; and the court, proceeding upon the idea that both the statute and the assessment made under it are absolutely void, decreed relief accordingly. Under the ruling just made on that subject this decree must, of course, be reversed, because as to the larger number of the shareholders whose taxes are enjoined there is no evidence that they owed any debts whatever at the time the assessment was made.

The allegations of the bill on this subject are:

1. That one shareholder owning five hundred and thirty-two shares of the stock made affidavit that the value of personal estate owned by him, including said bank shares, after deducting his just debts and other investments not taxable, did not exceed one dollar, and presented said affidavit to the board of assessors, with a demand that they should reduce the assessment of his shares accordingly, which was refused. The evidence shows this to have been Mr. Chauncey P. Williams.

2. The further allegation of the bill on that subject is that other shareholders were indebted to an amount equal to or in excess of the personal property owned by them, including their bank shares, but omitted to make affidavit and demand the proper reduction, because they knew such demand would be refused by the board, both from information of their refusal in other cases and from knowledge of the decisions of the Court of Appeals of New York that they had no authority to make such deduction. This allegation is also supported by the evidence of four or five shareholders who are represented in this action.

While the decree of the court enjoining the collecting officers as to all the tax assessed on the shares of this bank must be reversed, the question arises, What shall be done with the cases in which it appears that there are shareholders taxed who owed just debts entitled to deduction?

With regard to the case of Mr. Williams, we have no doubt that there should be an injunction to the amount of his tax. He made the requisite affidavit and the proper demand for deduction, and his affidavit shows that no assessment should be made on his shares. He has not yet paid the money, and is entitled to relief by injunction.

A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. That question is, whether the fact clearly established that their demand would have been

unavailing dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived, or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. (Bennett *v.* Hunter, 9 Wall., 326; Tacey *v.* Irwin, 18 Wall., 549; Atwood *v.* Weems, 99 U. S., 183.)

Without elaborating the matter, we are of opinion that, considering the decision of the Court of Appeals of New York, the action of the assessors in the case of Mr. Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation. It is, therefore, not now essential to show such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri*, the tax being unpaid. And we are of opinion that it is open to the court below when this case returns to permit such amendment of the pleadings as will enable plaintiff to make proper allegations on that subject, or by reference to a master to allow each shareholder to establish the amount of deduction to which he was entitled at the time of the assessment, and to enjoin the collection of a corresponding part of the tax. But as the assessment is not void, but only voidable, it must stand good for all of the assessment in each case which is not shown to be in excess of the just debts of the shareholder that should be deducted.

The decree of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with this opinion.

REVERSED.

THE EVANSVILLE NATIONAL BANK OF EVANSVILLE, INDIANA, v. THOMAS P. BRITTON, TREASURER OF VANDERBURGH COUNTY; AND THOMAS P. BRITTON, TREASURER OF VANDERBURGH COUNTY, v. THE EVANSVILLE NATIONAL BANK OF EVANSVILLE, INDIANA.

April 3, 1882.

On the principles announced in the two preceding cases, the taxation of national bank shares by the Indiana revenue laws, without permitting the shareholder to deduct from their assessed value the amount of his *bona-fide* indebtedness, as is allowed in the case of other investments of moneyed capital, is a discrimination against the act of Congress; and the collection of the illegal excess may be enjoined by those who prove that they owe debts which they are entitled to have deducted.

APPEALS from the Circuit Court of the United States for the District of Indiana.

Alexander Gilchrist, *Charles H. Butterfield*, *Asa Iglehart*, and *J. E. Iglehart*, for the Bank.

H. A. Mattison, *H. C. Gooding*, *J. S. Buchanan*, and *Cicero Buchanan*, for Britton.

MILLER, J.—These are cross-appeals from a decree of the Circuit Court for the District of Indiana, rendered in a suit in chancery, in which the Evansville National Bank was complainant and Britton, as treasurer of Vanderburgh county, was defendant.

The case is in all essential points analogous to that of Hills *v.* The National Exchange Bank of Albany, just decided.

And the principal question of law is the same as that discussed and decided in the case of the Board of Supervisors of Albany County *v.* Edward Stanley. In fact the three cases were advanced out of their order, and heard consecutively, because they involved important questions concerning taxation by State statutes of the shares of national banks, and the argument, able and exhaustive throughout, has been almost wholly directed, on the part of the banks, to establish the proposition

that, where the law of the State either makes or permits a discrimination operating only against a particular class of holders of national bank shares, in the manner of assessing those shares as regards other moneyed capital in the State, all the laws for such assessments are void, and all such assessments are absolutely void, and no tax on national bank shares can be collected in the State.

The brief of counsel in this case in various forms repeats the idea that the bill was brought not so much to assert the rights of stockholders who may have been injured by the enforcement of the statute, as to obtain a judicial declaration of this court that the act is void, and the attempt to tax the shares of the bank equally so.

We have rejected this proposition in the case of The Supervisors against Stanley, and have there given our reasons for it, and shall not repeat them here.

The objection made to the Indiana statute is the same as that made against the New York statute, namely, that it permitted the tax-payer to deduct from the sum of his credits, money at interest, or other demands, the amount of his *bona-fide* indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares.

A distinction is attempted to be drawn between the Indiana statute and the New York statute, because the former permitted the deduction of the tax-payer's indebtedness to be made from the valuation of his personal property, while in Indiana he can only deduct it from his credits. And undoubtedly there is such a difference in the laws of the two States. But if one of them is more directly in conflict with the act of Congress than the other, it is the Indiana statute. The subject of taxation from which the tax-payer may deduct his *bona-fide* indebtedness is, in the schedule of the act, placed under two heads, as follows:

"1. Credits, or money at interest, either within or without the State, at par value.

"2. All other demands against persons or bodies corporate, either within or without this State.

"Total amount of all credits."

The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona-fide* debts may be deducted, all mean moneyed capital invested in that way.

It is unnecessary to repeat the argument in the case of Williams *v.* Weaver, 100 U. S. R., 539, on this point. We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona-fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.

There is in the bill of complaint in this case the usual allegation, apart from the special matters we have just considered, that the assessing officers habitually and intentionally assess the shares of the national banks higher in proportion to their actual value than other property generally, and especially shares in other corporations. It is denied in the answer and is unsupported by proof.

It is also alleged that the bank is taxed a considerable sum for its real estate, and that in assessing the value of the shares no deduction is made on that account. The positive testimony of the assessor shows that such deduction was made.

It is alleged that the capital of the bank is almost entirely invested in the bonds and treasury notes of the United States, and

the shares only represent this untaxable investment. The case of Van Allen *v.* The Assessors, 3 Wall., 573, settles the principle that the shares of the national banks are taxable without regard to the value of the property held by the bank as a corporation, having exclusive relation to their value. The very point here made was expressly overruled in that case.

Acting upon these principles the Circuit Court decreed a perpetual injunction as to those shareholders who had proved in the case that at the time of the assessment they owed debts which should rightfully have been deducted. These were four in number, and the appeal of the collector, Britton, is from this injunction. The decree in that respect was right and must be affirmed.

The bank appeals from that part of the decree which dismissed the bill as to all the other shares. This was because no evidence was given that any other shareholders except the four above referred owed any debts which could have been deducted from the value of the shares. In the case of Hills *v.* The Albany Bank we authorized the court on return of the case to permit the bank to show what shareholders had such indebtedness in some appropriate form. It is not necessary to consider whether this case ought to be reversed at the instance of the bank to enable that to be done now, for it is stated by the counsel of the bank in their printed brief that the offer was made to them to have a reference to a master to take testimony on this point before final decree, and they declined to accept the privilege. That branch of the decree is, therefore, affirmed on the appeal of the bank.

WAITE, C. J. (dissenting.)—I cannot agree to so much of the judgment in this case as affirms that part of the decree below appealed from by Britton, the treasurer. "Credits" are but one of a number of kinds of moneyed capital. They represent, in the classification of taxable property, the ordinary debts due to a person, and it has been common for so long a time in the States to measure their taxable value by their ex-

cess over like debts owing to the same person in the same right, that I cannot believe it was the intention of Congress in its limitation on the power of taxing national bank shares to require a deduction of debts from the value of shares when such a deduction was only allowed to other persons from this one kind of moneyed capital. The law of Indiana expressly prohibits deductions from the value of any other property than credits. Ample provision is made for the taxation of all other moneyed capital at its value without deduction, the same as national bank shares. In Hepburn *v.* The School Directors, 23 Wall., 485, this court said "it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." In that case a tax on bank shares was sustained when, by law, mortgages, judgments, recognizances, and moneys owing on articles of agreement for the sale of lands were not taxable. I am unable to distinguish this case in principle from that. The exemption here is partial only, as it was there.

I am authorized to say that Mr. Justice GRAY concurs in this dissent.

AFFIRMED.

THE CITY OF MANCHESTER, VIRGINIA, v. O. A. ERICSSON.

April 17, 1882.

In a suit against a city for injuries caused by the unsafe condition of the embankment leading to a bridge to which a street of the city ran, the fact that the city owned stock and had advanced money to the corporation which held the title to the bridge does not make the city responsible for its defects; but the question is, whether the city by its action had treated the embankment as a street or an extension of a street, which is a question of fact for the jury, and an instruction taking from the jury the right to pass on this question is erroneous.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

Opinion of the court.

P. Phillips, *W. A. Maury*, and *C. C. McCrae*, for plaintiff in error.

C. V. Meredith and *G. K. Macon*, for defendant in error.

MILLER, J.—This is a writ of error to the Circuit Court for the Eastern District of Virginia.

The defendant in error, plaintiff below, recovered a judgment against the city of Manchester for injuries received by a fall from a public way, of which the city had been negligent, in regard to protecting the sides of a high embankment. The laws of Virginia authorize a recovery in such cases.

The chief controversy on the trial in the Circuit Court was on the question whether the city or a bridge company was responsible for the condition of the street in such a manner as to incur liability for negligence in the care of it. That part of the street where the accident occurred constituted also the approach to a bridge across the James River, between the cities of Manchester and Richmond, and both the bridge and this approach to it had been built, at least nominally, by an incorporated company called the James River Bridge Company, and the contention of the defendant below was that this corporation was the responsible party and the city was not.

That point was much pressed in argument before us, and it seemed to be assumed that if the bridge company was liable the city was not. We do not think that this necessarily follows, for the bridge company may be liable for negligence in regard to the *locus in quo* as an approach to and part of their bridge, while the city may also be liable for like negligence regarding it as a street for the care of which it is responsible. The question in this case is whether the *city* is liable.

This depends, in our opinion, not so much on the question whether the place where the injury occurred was, by law, placed under the exclusive control of the city, as whether the city authorities had so far assumed the care of it as one of the

streets of the town as to incur an obligation to be diligent and watchful in the performance of that duty.

The judge in his charge to the jury attached much importance to the fact that the bridge was built by money advanced by the city of Richmond and the town of Manchester, and assumed that the corporation was a mere matter of form, and, though chartered by the Legislature, was only an agency of the two municipal corporations to connect their towns by a bridge spanning the river which runs between them.

We are not satisfied of the soundness of this view, though it appears that the two cities owned all the stock and advanced the money. It still remains that the corporation was the legal entity which owned the bridge; that if it had borrowed money or created debts the cities would not have been liable for them without an express agreement to that effect; and if the negligence by which plaintiff suffered was solely the negligence of the bridge company and its officers, the city of Manchester would not have been liable because of the stock held by it in the company or the money advanced to it.

But testimony was submitted to the jury tending to show that after the bridge and this approach to it had been built, or commenced, the limits of the city of Manchester had been extended so as to include this part of the bridge or approach, and that the city did work on it as a street, or extension of the street into which it ran, and in many ways assumed such control of it as it did of other streets.

This testimony is in the record, and was proper evidence to sustain the proposition that the city authorities had so acted in regard to this part of the highways of the city as to make it responsible for a more careful attention to the dangerous condition of it than was given by them.

The counsel of defendant prayed several instructions in regard to the sufficiency of this evidence, which were refused by the court, and instead of those asked it gave the following:

"There are three questions for the jury, namely:

"1st. Whether a proper guard or protection had been pro-

vided at the point where the accident to the plaintiff occurred. If there was not—

"2d. Whether the accident was in consequence of the absence of such proper guard or protection; and

"3d. If so, whether damage ensued to the plaintiff, and what amount of money shall be allowed as the measure of damage to him.

"If the jury believe from the evidence that a proper guard or protection to the highway was not provided, that the accident occurred in consequence, and that damage ensued to the plaintiff from the accident, then the court instructs the jury that the city of Manchester is liable for the damage, unless it proves that the plaintiff sustained his injury through his own negligence or want of care."

It will be seen that the court here takes from the jury entirely the question whether the city was responsible for the want of the guard or protection which was absent, and instructs them peremptorily that if such protection was wanting and the accident was caused by its absence, the city was liable.

We think it was for the jury to decide whether the city had made itself responsible.

The evidence on this subject had been properly submitted to the jury. Whether the city had assumed such control of the *locus in quo* as to make it responsible, was an inference of fact to be drawn from all the testimony by the jury, and not a question of law for the court.

This evidence consisted of various things done by order of the authorities of the city of Manchester, such as paying the money on condemnation of the land for the use of the bridge, regulating the grade of the approach to the bridge and of the neighboring streets, continuing the pavement of the street into and upon this approach, depositing cinders on it, building a fence on the side of it, and otherwise expending money on it.

In our opinion, though strongly persuasive of the proposition that the city had assumed charge of the place, the evidence was not necessarily conclusive. The inference was one of fact

and not of law, and was to be made, if at all, by the jury, under such proper instructions on the matter as the court should give, and not by the court alone. It was a mixed question of law and fact, proper for the jury, aided by the court.

For this error the judgment of the Circuit Court is reversed, and the case remanded with instructions to set aside the verdict and grant a new trial.

REVERSED.

H. BLENNERHASSETT, W. A. STEPHENS, AND THE CHARTER OAK LIFE INSURANCE COMPANY v. HOYT SHERMAN, ASSIGNEE OF B. F. ALLEN, AND B. F. ALLEN.

April 17, 1882.

1. A mortgage executed by an insolvent mortgagor and covering his entire estate, to his creditor, who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, conceals the mortgage and withholds it from the record, and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he cannot pay, is void at common law.
2. A mortgage executed by an insolvent debtor with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from the record for two months, is void under the bankrupt act, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The bill in this case was filed January 26, 1875. The suit was brought to foreclose a mortgage executed by B. F. Allen, lately of the city of Chicago, in the State of Illinois, to Allen, Stephens & Co., of the city of New York. The firm was composed of B. F. Allen, the mortgagor, and William A. Stephens and Herman Blennerhassett. The bill of complaint set out the mortgage in full, as follows:

Statement of the case.

"NEW YORK, 18 Nov., 1874.—I hereby acknowledge the receipt of four hundred and sixty-five thousand four hundred and seventy-six and $\frac{88}{100}$ dollars of advance to the Cook County National Bank of Chicago, for my account, same being made by Allen, Stephens & Co. in money, paper, and indorsements. I have arranged with them for additional advances. In consideration thereof I hereby grant and convey to Allen, Stephens & Co., by way of mortgage and security for such advances, all my real estate of every kind and description, and wherever situated. B. F. ALLEN."

This instrument was duly acknowledged by Allen before a notary public in the city of New York, and delivered to the complainants, Stephens and Blennerhassett. It was not recorded until January 19, 1875. On that day it was filed for record in Cook county, Illinois, and on the next day in Polk county, Iowa.

The bill charged "that in consideration of said security the complainants had further advanced to said Allen in money and valuable securities, and become personally liable by indorsement of securities for said Allen, in the further sum of four hundred and thirty-four thousand five hundred and twenty-three dollars and twelve cents, making a total amount of advancements and indorsements on account of said security of the sum of $900,000, paid and advanced by your orators, and for which they became liable as indorsers." The bill then gave a description of the real estate which complainants claimed was covered by the mortgage, and prayed for an account of the moneys advanced by the complainants to Allen, and the moneys paid by them on account of the liabilities incurred and the amounts intended to be secured by the mortgage, and for a foreclosure of the same and general relief.

On February 8, 1875, the mortgage mentioned in the bill was assigned by Allen, Stephens & Co. to the Charter Oak Life Insurance Company of Hartford, Connecticut, and on April 17, that company, leave of the court having been obtained allowing it to intervene and become a party complainant, filed

Statement of the case.

a supplemental bill, in which the assignment of the mortgage was averred. On February 23, 1875, a petition in bankruptcy was filed against B. F. Allen in the United States District Court for the District of Iowa, and on April 22 he was adjudged a bankrupt, and on July 1 following Hoyt Sherman was appointed assignee of his estate.

Afterwards, on August 7, 1875, Stephens and Blennerhassett and the Charter Oak Life Insurance Company filed their bill of review, in which they prayed that Hoyt Sherman, the assignee of Allen, might be made a party defendant. Allen was retained as a defendant on account of a claim of homestead which he set up to certain of the property covered by the mortgage.

In this bill, which is called in the record "a bill of revivor and consolidated bill," the complainants averred that prior to the date of the mortgage Allen had applied to Stephens and Blennerhassett, as copartners in the firm of Allen, Stephens & Co., in behalf of the Cook County National Bank, to make to the bank, upon the credit and responsibility of Allen, certain large advances of money, commercial paper, and indorsements, and that in pursuance of such application Allen, Stephens & Co. did make such advances to the amount of $465,476 prior to the date of the mortgage, and that after its date "they continued to make advances of money and valuable securities to the said Cook County National Bank at the request of said B. F. Allen; and between the said date of the 18th of November, 1874, and the date of the suspension of payment by the said Cook County National Bank, as hereinafter set forth, in addition to the said sum of four hundred and sixty-five thousand four hundred and seventy-six $\frac{88}{100}$ dollars ascertained and acknowledged to have been received at the date of said mortgage, the said Allen, Stephens & Co. advanced in the aggregate the sum of two million seven hundred and twenty-two thousand two hundred and eighty-four and $\frac{29}{100}$ dollars.

"That said Cook County National Bank from time to time, between said dates, to wit, between the said 18th day of Novem-

ber, 1874, and the 18th day of January, 1875, made remittances to the said firm of Allen, Stephens & Co., on account of said advances, which remittances were made in currency and in bills receivable, on which currency was realized, and all of which was applied on account and was sufficient to extinguish and did extinguish wholly the amount so advanced prior to the date of the execution of said mortgage, but was wholly inadequate to pay the amount advanced subsequent to said date. That the balance due on account of said advances and in excess of the credits and remittances aforesaid, on the said 18th day of January, 1875, and still due and unpaid, is the sum of nine hundred thousand dollars."

Hoyt Sherman, the assignee, filed his answer to this bill, in which he averred that the advances made by Allen, Stephens & Co. prior to the date of the mortgage were made to Allen on his own individual account and for his own use, and not to the Cook County National Bank, but denied that such advances amounted to the sum of $465,476, "or anything like that amount." He admitted the execution of the mortgage, but charged that on and prior to its date Allen was largely indebted to persons and banks in New York city and to the Cook County National Bank; that he was insolvent; his liabilities were more than $1,500,000, and exceeded his assets by at least $600,000; that the Cook County National Bank was embarrassed and unable to pay its debts, and that all these facts were then well known to Stephens and Blennerhassett; that they, desiring to take advantage of the necessities of Allen, and desiring to extort from him a mortgage on his real estate in Iowa and elsewhere, in fraud of his other creditors, falsely represented to him that he was largely indebted to the firm of Allen, Stephens & Co. for advances theretofore made to the Cook County National Bank for his account, "and that if he, Allen, would execute to said firm an agreement or mortgage as hereinbefore mentioned, said firm of Allen, Stephens & Co. would advance or procure to be advanced to him an amount that would be sufficient to enable him and the said Cook County National Bank

to go on with their business, and that they would continue to make such advances till he and the said bank had gotten over their crippled financial condition, and were able to go on with their business without such assistance; and that if he, the said Allen, would do so, that the same should not be put upon record, and should not in any manner be uttered or published; that it should be held by said Stephens and Blennerhassett, and should be kept from the knowledge of all the general creditors of said Allen and of said Allen, Stephens & Co.; that the only use they would make of it would be as a justification to their depositors for making such advances to said Allen, and then only in case any question should be made with them, the said Stephens and Blennerhassett, by such depositors in regard thereto; and that it should in no way or manner have any force or validity, even between the said parties thereunto, unless the said Allen, Stephens & Co. should advance to said Allen funds sufficient to enable him and the said Cook County National Bank to go on with their business, as above stated, and then that it should be held by them, the said Stephens and Blennerhassett, and in no way used without the consent of the said Allen.

"They further declared to Allen that if he refused to execute said mortgage they would at once cease to make advances to him or the Cook County National Bank, and would take no steps to protect the drafts drawn by the Cook County National Bank on New York, which would cause its suspension. That Allen being in great need of money, and relying on the representations of Stephens and Blennerhassett, and believing that if he could procure the aid which they promised he could sustain the Cook County National Bank and pay off his debts, and fearing lest Stephens and Blennerhassett would carry out their threats, executed said mortgage."

The answer averred that Allen, Stephens & Co., on and before January 18, 1875, refused to make the advances upon the making of which alone said mortgage was to have any validity or effect, even between the parties thereto, and said firm in other respects failed to comply with the promises made,

upon the faith of which the said mortgage was executed. That in consequence of the refusal and failure of Stephens and Blennerhassett to comply with their promises, Allen and the Cook County National Bank were compelled to and did suspend payment, and to quit business and go into liquidation, and so it was averred the said mortgage became null and void.

The answer denied that after the execution of the mortgage Allen, Stephens & Co. continued to make advances to the Cook County National Bank; denied that there was due from Allen or the Cook County National Bank to Allen, Stephens & Co. the sum of $900,000, and averred that Allen and the Cook County National Bank had paid and delivered to Allen, Stephens & Co. in money and securities sufficient to satisfy all the advances of said firm to Allen and the Cook County National Bank, if any such were made.

It was further averred in the answer as follows:

"That on and prior to the 18th day of November, 1874, the date of said pretended mortgage, the said B. F. Allen and the said Cook County National Bank was each insolvent and unable to pay their debts; that said firm of Allen, Stephens & Co., as well as the several members thereof, had, at and prior to such date, reasonable cause to believe said Allen and said bank were each insolvent; that said firm fraudulently procured said Allen to execute and deliver said pretended mortgage, knowing it was made to and would give said firm a preference over the other creditors of said Allen, and that it was made in fraud of the provisions of the bankrupt law, and the more effectually to perpetrate such fraud on the general creditors of said Allen at the time said mortgage was executed and delivered, and said Stephens and Blennerhassett, for themselves and said firm, agreed to conceal the same, not to publish the same, or put the same on record; and in pursuance of such agreement they did, with intent to defraud the general creditors of said Allen, keep the same in their possession for two months after it was executed, and until the 19th day of January, 1875, and until they had positive knowledge that the said Allen and the said

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Cook County Bank would be compelled to suspend, when said pretended mortgage, or a copy thereof, was fraudulently, and for the purpose of creating an illegal preference in their favor, filed for record in the recorders' offices in the different counties in Iowa and Illinois wherein the real estate of said Allen is situated. That while said mortgage was, as aforesaid, secretly kept by said Stephens and Blennerhassett, it had no effect or validity as against the other creditors of said Allen, and that as to them—if valid between the parties to it, which this respondent denies—it only took effect at and from the time the same was filed for record, which was within the two months next prior to the filing of the petition in bankruptcy against the said B. F. Allen, and on which he was adjudged a bankrupt as aforesaid; and that the same is fraudulent and void under and by virtue of the provisions of the national bankrupt law and the amendments thereto, and that the same is now a cloud upon the said real estate then owned by said Allen, the title of which has passed to your orator as the assignee of said bankrupt, and it ought by the decree of this honorable court to be so declared and said cloud removed."

The complainants filed the general replication to this answer.

Afterwards, on January 17, 1876, an amendment was filed to the said "consolidated bill," in which it was averred that, by the application of money collected by Allen, Stephens & Co. from collateral securities held by them to secure the amount due them from the Cook County National Bank, the amount of such indebtedness had been reduced to the sum of $784,000, by reason whereof the said firm of Allen, Stephens & Co. had no longer any beneficial interest in said mortgage, but the entire and absolute interest in and ownership of said mortgage was held and owned by the Charter Oak Life Insurance Company.

Hoyt Sherman, as assignee of B. F. Allen, filed his cross-bill against Stephens, Blennerhassett, and the Charter Oak Insurance Company, alleged the invalidity of said mortgage on substantially the same grounds as those set up in the answer,

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and prayed that the mortgage mentioned in the original bill might be declared fraudulent and void, and the cloud upon the title to the real estate of the bankrupt, B. F. Allen, created by the registry of the same, might be removed. The defendants to the cross-bill filed their answer thereto, to which Sherman, the assignee, filed the general replication.

It is unnecessary to state the pleadings in greater detail. Proofs were taken, and upon final hearing the Circuit Court dismissed the original bill and made a decree in accordance with the prayer of the cross-bill, declaring the mortgage to be null and void and cancelling the same. The appeal of the complainants brings up this decree for our consideration.

The defendants in the court below contended that the mortgage was void because—

1st. It was procured by fraud and used without the consent of Allen, and was given and received to hinder, delay, and defraud Allen's creditors.

2d. It was concealed and kept from the records from its date until January 19, 1875, and until after Allen failed, and that such concealment gave to Allen and the Cook County National Bank a delusive and fictitious credit, thereby enabling Allen, under the semblance of being the owner of a large amount of unincumbered real estate, to deceive and mislead other persons to give him credit which would otherwise have been withheld, by reason of which Allen did contract debts after the giving of this mortgage, now remaining unpaid, of a greater amount than the value of the real estate covered by this mortgage. Many of these debts were contracted by Allen, Stephens & Co. upon the representations of W. A. Stephens and H. Blannerhassett, members of said firm, while they held this mortgage in concealment, that Allen's real estate was a vast property and was unincumbered.

3d. This mortgage was a fraudulent preference under the provisions of sections 5128, 5129, and 5130*a* of the Revised Statutes of the United States, under the title of bankruptcy, then in force.

4th. If the instrument was valid, it was given to secure a debt of B. F. Allen, and not a debt of the Cook County National Bank; and that B. F. Allen did not then, nor does he now, owe Allen, Stephens & Co. anything.

5th. If the advances were made by Allen, Stephens & Co. to the Cook County National Bank, such advances would create no valid debt against the said bank under section 5202 of the Revised Statutes of the United States, and being no debt there can be no mortgage.

6th. The instrument is not a legal mortgage for the reason that it describes neither debt nor real estate.

Nourse & Kaufman, *Hubbard & Hyde*, and *Coles Morris*, for appellants.

J. S. Polk and *L. H. Bisbee*, for appellee.

WOODS, J.—After an attentive consideration of the evidence in this case, much of which is conflicting and irreconcilable, we have reached the conclusion that the mortgage which is the basis of the suit is fraudulent and void at common law, because it was accepted by Allen, Stephens & Co. and used by them to hinder, delay, and defraud the creditors of B. F. Allen, the mortgagor, and that it is also void under that section of the bankrupt act now embodied in the Revised Statutes of the United States as section 5128.

We shall state the grounds of our conclusion as succinctly as the case will admit. We are relieved from any discussion of the question of the insolvency of Allen, the mortgagor, by the admissions of counsel for the appellants. It is conceded by them—a fact which, in our judgment, the evidence abundantly shows—that not only at the date of the mortgage, on November 18, 1874, but also at the date of its registration, on January 19, 1875, Allen was insolvent. It is conceded that at the same dates the Cook County National Bank was also insolvent. We may add to this concession, what is perfectly clear from the evidence, that the insolvency of both Allen and the bank

was actual and absolute; that their assets were largely insufficient to pay their debts.

In order to a clear understanding of the controversy between the parties, it will be necessary to state generally the financial history of B. F. Allen and of the firm of Allen, Stephens & Co., of which B. F. Allen was the senior member prior to the date of the mortgage.

In 1856 Allen commenced business as a private banker in Des Moines, Iowa. He soon began dealing in Iowa lands. He bought claims, made entries, and located them mainly in Polk county, Iowa. The real estate of which he was seized at the date of this mortgage had cost him two hundred and forty-two thousand six hundred and sixteen dollars, and that of which he was seized on January 18, 1875, had cost him two hundred and forty thousand seven hundred and ninety-four dollars.

He continued his business as a banker in Des Moines up to a short time before the proceedings in bankruptcy were instituted against him. On October 31, 1867, he was appointed by the United States Circuit Court for the District of Iowa receiver in the case of Mark Howard *v.* The City of Davenport, then pending in that court, and as such there came into his hands five hundred and forty-one bonds of one thousand dollars each of the Chicago, Rock Island & Pacific Railroad Company, and between ninety thousand dollars and one hundred thousand dollars in cash. The bonds bore seven per cent. interest per annum, which Allen collected as it fell due, amounting to thirty-seven thousand eight hundred and seventy dollars per annum. He continued the custodian of this entire fund until May, 1873.

In 1868, according to Allen's evidence, which is corroborated by his books, his assets amounted to one million six hundred and forty-one thousand and seventeen dollars, and his liabilities, including his indebtedness as receiver, amounted to one million four hundred and sixty-six thousand one hundred and thirty-one dollars, leaving an excess of assets over

liabilities of one hundred and seventy-four thousand eight hundred and eighty-six dollars. Of these assets one hundred and fifty thousand dollars were invested in his house and furniture, in addition to the cost of the land, one hundred and thirty acres, on which his house stood.

It is, therefore, apparent that at the time mentioned he had little or no available capital of his own with which to carry on business. This state of his affairs caused him to succumb to the temptation to use the trust assets in his possession as receiver. Towards the close of the year 1868 he had deposited a part of the Chicago, Rock Island & Pacific Railroad bonds, (which we shall call for the sake of brevity Rock Island bonds,) which belonged to this trust fund, with Gilman, Son & Co., bankers in the city of New York, and borrowed upon them as collateral security the sum of fifty-five thousand dollars. At this time Blennerhassett was the confidential clerk of Gilman, Son & Co.

On November 2, 1868, Blennerhassett left that firm and became a partner in the banking-house of George Opdyke & Co., in which Stephens was already a partner. At the solicitation of Blennerhassett, Allen, on December 19, 1868, changed his account from Gilman, Son & Co. to George Opdyke & Co. During the years 1869, 1870, and 1871, it is made clear by the letters of Allen to Opdyke & Co., which appear in the record, that Allen was pressed for money and embarrassed. During this time he was speculating largely in the stock of the Chicago, Rock Island & Pacific Railroad Company, and had used through Opdyke & Co. a large part of the Rock Island bonds which belonged to the receiver fund in his possession.

In the fall of 1871 Stephens and Blennerhassett began negotiations with Allen with a view to a partnership between the three to carry on the business of banking in the city of New York, which resulted in the creation of the partnership of Allen, Stephens & Co., which began business on January 1, 1872.

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It was agreed that Allen should furnish the capital on which the partnership was to do business. The amount named was fifty thousand dollars.

At this time Allen was largely insolvent, and neither Stephens nor Blennerhassett had any means. Allen never contributed any money or property to the partnership capital. Stephens and Blennerhassett were not required by the partnership articles to pay anything, and paid nothing. The firm, therefore, started without any capital whatever; two of the partners had no property, and the other owed more than he could pay.

The complainant, the Charter Oak Life Insurance Company, at once made a large deposit with the new firm, and in a few days their deposits amounted to more than two hundred thousand dollars. With the funds thus placed in their hands they paid the overdrafts of Allen on Gilman, Son & Co., and received from them the securities which had been deposited with them by Allen, namely, one hundred and sixty-eight Rock Island bonds of one thousand dollars each, certificates of three thousand and fifty shares of stock of National State Bank of Des Moines, and of nine hundred and sixty shares of First National Bank of Des Moines.

It is unnecessary to trace minutely the shifts and devices to which Allen resorted to keep afloat. They are fully shown by the record. On October 7, 1872, it appears from a letter addressed to him by Stephens for the firm of Allen, Stephens & Co., that he was indebted to the firm in the sum of three hundred and seventy-nine thousand dollars, and the security held by the firm was four hundred and sixteen Rock Island bonds. That these were the bonds which belonged to the fund of which Allen was receiver, the record leaves no doubt. Allen so testifies, and there is no conflicting testimony, and his possession of so large an amount of these bonds is not otherwise accounted for.

All the bonds which belonged to the receiver fund were at various times pledged by Allen. They all passed through the

hands of New York brokers as collateral security for loans made by him. In January, 1873, all the Rock Island bonds held by Allen as receiver were in the hands of a broker in New York, held by him as security for advances made to Allen. This broker continued to borrow upon them for Allen until July 1, 1873, when he commenced selling, and continued to sell them until October, 1873, before which nearly all were disposed of, some of them at quite low prices.

During the months of February, March, and April, 1873, Allen paid the broker who negotiated these loans for him the sum of $43,000 extra interest over and above seven per cent. on the loans.

Before May, 1873, it fairly appears from the evidence that Allen's losses had entirely consumed the receiver fund intrusted to him. In the month just mentioned he was ordered to pay into court by the middle of July the five hundred and forty-one bonds of $1,000 each which had come into his hands as receiver, or their equivalent in money. The residue of the fund, amounting to about $300,000, was to be paid in May of the following year. He was in a desperate strait, and resorted to desperate means to save himself. On May 30, 1873, he purchased $275,000 of the stock of the Cook County National Bank of Chicago, Illinois, which gave him the control of the bank. He paid for a large part of this stock by his checks on the bank, and the residue by a check on Allen, Stephens & Co.

Having thus obtained the control of the Cook County Bank, which had a deposit of $1,300,000, he paid the $541,000 demanded of him as a part of the receiver fund, mainly by his checks on the bank. At this time the larger part of the receiver's bonds had been sold and their proceeds applied to the payment of moneys borrowed by Allen in New York on the pledge of the bonds.

In the fall of 1873 Allen bought an interest in the New York State Loan and Trust Company. His purchases of stock in that institution amounted to nearly $200,000. He paid for this stock by giving his notes and a check on the Cook County

Bank. His object in making this purchase, as Allen states it, was to get control of the institution and be enabled thereby "to carry his assets until he could realize on them." In other words, he bought the stock on credit with a view to get in his hands the cash assets of the trust company.

During the panic of September, 1873, the Cook County Bank lost $100,000 by the purchase of worthless drafts drawn by one Badger. The bank suspended a short time, but soon resumed.

During the fall of 1873 the private bank of Allen at Des Moines and the National State Bank of Des Moines, in which Allen was a large stockholder, were both overdrawn with the house of Allen, Stephens & Co. They were both hard pressed for money.

In January, 1874, Allen sold, through the house of Allen, Stephens & Co., to the Charter Oak Life Insurance Company, bills receivable, "in the shape of mortgages," drawn from his private bank in Des Moines, to the amount of $114,000. This money all passed through the books of Allen's private bank at Des Moines.

In May, 1874, the house of Allen, Stephens & Co. made a loan of $400,000 to two men of the name of Hussey and Gisbourne, and took for security a deed of trust to Stephens upon a silver mine, called the Mono Mine, in Utah Territory. The Charter Oak Life Insurance Company took one-third of this loan off the hands of Allen, Stephens & Co. The mine proved worthless, and the entire loan was a dead loss, taking from Allen, Stephens & Co. $266,666. This largely exceeded all the profits made by the firm since it commenced business, and left it insolvent.

In October, 1874, it was arranged between Allen and the Charter Oak Life Insurance Company, the negotiation therefor having been carried on through Allen, Stephens & Co., that Allen should make his twelve notes for $25,000, payable in five years from date, and deliver the same to the Charter Oak Insurance Company, and secure the same by pledge of mortgage notes, stocks, and bonds. The Charter Oak company

was to advance to Allen $300,000 on the notes so secured. Allen, on October 24, 1874, made his notes accordingly, and delivered them to Allen, Stephens & Co. for the Charter Oak company, and the company sent $300,000 of its paper to Allen, Stephens & Co. to be used for Allen's benefit. The notes of Allen were secured by the pledge of mortgage notes amounting to $277,041; by Cook County Bank stock, $70,000; New York State Loan and Trust Company stock, $100,000; National State Bank of Des Moines stock, $30,000; and county bonds, $500; amounting in all to $478,000.

On the same day Allen, for himself, executed to Allen, Stephens & Co. a paper writing, in which he authorized them, in case he became indebted to them for loans or advances, or liabilities assumed by them for him, to sell, without notice to him, any property, things in action, collateral securities belonging to him and held by them, or to hypothecate the same and use their proceeds towards the payment of such indebtedness and the interest. On the same day he executed and delivered to Allen, Stephens & Co. a similar paper as president of the Cook County Bank.

Between the date of his appointment as receiver and October 24, 1874, Allen had sustained great losses. In 1871 he had lost by stock speculations in New York city $200,000; he had lost $50,000 by a subscription to the Canada Southern Railroad; he built for a church society at Des Moines a church edifice, in which was tied up the sum of $60,000, and which afterwards resulted in a loss of $50,000. In 1873 and 1874 he had lost $200,000 as a member of the firm of B. F. Murphy & Co., and $75,000 as a member of the firm of H. M. Bush & Co., and $30,000 in the firm of Lewis & Stephens. In swamp, coal, and mountain lands he lost $61,000. He lost in corn speculations in Chicago and in property in the towns of South Evanston, Illinois, and Sheffield, Indiana, $92,000. He sunk $35,000 in the stock of the Toledo, Wabash and Western Railroad Company, and lost $30,000 in the firm of A. T. Andreas & Co., and $10,000 invested in the Grand Pacific Hotel

in Chicago. Besides his residence and furniture at Des Moines, which cost him $150,000, he had invested in a residence in Chicago $50,000. His actual losses amounted to over a million of dollars, and he had $200,000 invested in unproductive real estate. It is true so inveterate a speculator sometimes made a fortunate venture, but his losses were greatly in excess of his gains.

The mortgage on which this suit is founded was given on November 18, 1874. On that day the firm of Allen, Stephens & Co. was insolvent, and Stephens and Blennerhassett must have known it. Their profits since January 1, 1872, when the partnership was formed, had not exceeded $200,000. They began with no capital. Both Stephens and Blennerhassett had drawn out their share of the profits. Allen's share remained, which was one-third, and amounted to about $66,000. The loss of the firm in the Mono Mine loan was $266,000, leaving a deficit of $200,000. As already stated, it is conceded that at the date of the mortgage both Allen and the Cook County Bank were insolvent. But they were not merely insolvent, but irretrievably so.

On that day Allen owed the depositors in his private bank at Des Moines $736,783; he owed the Cook County Bank $557,943, the Charter Oak Life Insurance Company $300,000, the Newark Savings Institution of Newark, New Jersey, $200,000, making an aggregate of $1,794,726. At the same time, placing a liberal estimate on the value of his assets, they did not exceed $800,000, leaving a deficit of $994,727, which other smaller items of indebtedness shown by the record would swell to more than a million of dollars, the excess of his liabilities above his assets. The condition of the Cook County Bank on the same day may be approximately ascertained from the following facts: On November 18, 1874, its books showed its indebtedness to be $1,891,620. The receiver of the bank, testifying on August 26, 1876, said that he had admitted and given certificates for claims against the bank to the amount of $803,035, that other claims had been presented to the amount

of $915,000, for which receiver's certificates had not been given, and that the amount collected from its assets was $92,000. The cash on hand when the receiver took possession was $4,000.

Such was the condition of the firm of Allen, Stephens & Co., B. F. Allen, and the Cook County Bank when the mortgage in suit was executed.

There are several propositions of fact which, in our opinion, the evidence satisfactorily shows. A statement and discussion of the evidence which sustains these conclusions of fact would extend this opinion beyond reasonable limits, and would not be profitable.

First. Allen when he gave the mortgage and Stephens and Blennerhassett when they took it knew that both Allen and the Cook County Bank were insolvent. A large part of the correspondence between Stephens and Blennerhassett and the firm of Allen, Stephens & Co. on the one hand, and Allen on the other, commencing before the partnership of Allen, Stephens & Co. was formed, down to the date of the mortgage, is to be found in the record. The record also contains the correspondence between Allen, Stephens & Co. and the Cook County Bank, and many letters written by Allen, Stephens & Co. in the interest of Allen, and much correspondence between Stephens and Blennerhassett. This evidence shows that both Allen and the Cook County Bank were on the verge of suspension from the time when Allen was compelled to replace the bonds intrusted to him as receiver down to the date of the mortgage in November, 1874, and their suspension in January, 1875. It also brings home to Stephens and Blennerhassett the knowledge of the desperate shifts and devices to which Allen and the bank were driven to meet their engagements and keep the fact of their utter bankruptcy from the knowledge of the public. It is impossible that men of much less business experience and intelligence than they are shown to be should know what they did of the resources and practices of Allen and the Cook County Bank, and not have known of the insolvency of both.

Notice of the insolvency of Allen was also brought home

to Stephens and Blennerhassett by their knowledge of the fact that Allen had appropriated to his own schemes and speculations a fund which, principal and interest, amounted to over $800,000, committed to his custody as a trustee and receiver. The evidence that they knew of the fact of his appointment as receiver, the amount of the fund which came to his hands, and the appropriation of the fund to his own uses, is conclusive.

During the sixty days which elapsed between the date of the mortgage and its registration, the proofs of the insolvency of Allen and the Cook County Bank accumulated, and Stephens and Blennerhassett knew that the insolvency was hopeless and irretrievable.

Second. The record shows that the mortgage covered all the property of Allen. His personal property had long been exhausted, and his real estate was all that remained which was not pledged for his debts.

Third. In order that the credit of Allen and the Cook County Bank might not be impaired, the mortgage was purposely withheld from record and actively concealed by Stephens and Blennerhassett until after the suspension of both Allen and the Cook County Bank on January 18, 1875.

Blennerhassett testifies that after its execution he disposed of the mortgage as follows: "I put it in our safe and kept it there until December 1, when I gave it in a sealed parcel to A. N. Denman. I said to Denman something like this: 'Here is a sealed package which contains instructions and valuable documents; you will go to Chicago, take quarters at some hotel there, and remain there, never leaving the hotel for any great length of time; and should a telegram come, you are to open that parcel and obey instructions.'"

The instructions directed Denman, when ordered by telegram to act, to have the mortgage recorded in Chicago, and then catch the first train for Des Moines, Iowa, and have it recorded there, &c.

On January 18, 1875, Allen and the Cook County Bank both

suspended. On the next day Allen, Stephens & Co. sent a telegram to Denman at Chicago, as follows: "Open your instructions and act." Denman opened his instructions and followed them. He filed the mortgage for record in Chicago on January 19 and in Des Moines on January 20.

Fourth. While the mortgage was thus kept from the record and from public knowledge, Stephens and Blennerhassett were busily engaged in sustaining the credit of Allen and the Cook County Bank, and to accomplish their end falsely and fraudulently represented Allen to be a man worth over a million of dollars and of unlimited credit, and the Cook County Bank to be sound and good.

Fifth. That by means of these representations of Stephens and Blennerhassett, and the concealment of the mortgage, and the withholding of it from the record, the creditors of Allen and the Cook County Bank were misled and deceived, and in consequence thereof they did, between the date and the registration of the mortgage, deposit large sums of money in Allen's private bank at Des Moines and in the Cook County Bank, and at the instance of Stephens and Blennerhassett discounted the paper of Allen and the Cook County Bank to a large amount, and that such deposits and discounts, though due, still remain unpaid.

Sixth. That the mortgage was made by Allen, who was insolvent, with a view to give a preference to the firm of Allen, Stephens & Co., the firm being a creditor of Allen individually, and the firm and all its members having reasonable cause to believe Allen to be insolvent and knowing that the mortgage was made in fraud of the provisions of the bankrupt act, and it was withheld from the record and actively concealed for the period of two months preceding the failure of Allen and the filing of the petition in bankruptcy against him, for the purpose of protecting it from assault as a preference void under the provisions of the bankrupt act.

There is a large mass of evidence in the record which, in our opinion, establishes the truth of the foregoing propositions

beyond controversy. The new debts which were contracted by Allen and the Cook County Bank, after the date of the mortgage and before its registration, on the strength of the representations of Stephens and Blennerhassett, and the fact that Allen's property appeared to be unincumbered, amounted to a larger sum than the value of the real estate covered by the mortgage.

By the aid of the means thus obtained, Stephens and Blennerhassett were able to stave off the suspension of Allen and the Cook County Bank for a period of exactly two months after the date of the mortgage. They doubtless supposed this lapse of time would render the mortgage proof against any attack by an assignee in bankruptcy of Allen's estate. Allen and the bank were then allowed to fail and the mortgage was placed on record.

Upon this state of facts we are of opinion that the mortgage was a fraud upon the creditors of Allen, and, therefore, void at common law, and without regard to the provisions of the bankrupt act.

It is not to be disputed that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage.

But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers the mortgagor's entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give credit to the mortgagor, who fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive

of the mortgagee be gain to himself or advantage to his mortgagor.

It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration;—it must be also *bona fide*. If it be made with intent to hinder, delay, or defraud creditors, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. (Twyne's Case, 3 Co. Rep., 81; Holmes *v.* Penney, 3 Kay & J., 99; Craig *v.* Martin, 12 Allen; Brady *v.* Briscoe, J. J. Marsh., 212; Bozman *v.* Draughn, 3 Stew., 343; Farmers' Bank *v.* Douglass, 11 Sme. & Mar., 469; Burn *v.* Ahl, 29 Penn.; Root *v.* Reynolds, 32 Vt., 139; Kempner *v.* Churchill, 8 Wall., 362; Kerr on Fraud and Mistake, 200.)

As long ago as the case of Hungerford *v.* Earle, 2 Vern., 260, it was held that "a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money." This doctrine has been repeatedly reaffirmed. (Chancellor Kent, in Hildreth *v.* Sands, 2 Johns. Ch., 35; Scrivener *v.* Scrivener, 7 B. Monr., 374; Bank of the United States *v.* Hineman, 6 Paige, 526.)

In Coates *v.* Gerlach, 44 Penn., 43, a deed of land had been made directly by a husband to his wife. The deed bore date March 23, 1857, but was not filed for record until December 2, 1857. On January 21, 1858, the husband, professing to act for his wife, sold the land to a third party. The creditors of the husband attached the unpaid part of the purchase-money in the hands of the vendees, and between them and the wife a contest arose on the question which had the better right to the proceeds of the sale. Touching this controversy, Mr. Justice Strong, delivering the opinion of the court, said: "There is another aspect of the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it, in fact concealed its existence until after her

husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."

So in Hilliard *v.* Cagle, 46 Miss., 309, it was held that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may nevertheless be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde* showing the conduct of the parties in their dealings in reference to the deed. The principal circumstance relied on in this case to avoid the deed was the fact that the grantor retained possession of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The court declared that "the natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known, and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object."

In the case of Gill *v.* Griffith and Schley, 2 Md. Ch., 270, the court decided that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request and to keep the public from a knowledge of its existence withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage which was in controversy in

this case was, therefore, declared void. Upon appeal, the Court of Appeals affirmed the decree for the reasons assigned by the chancellor. (See note of the reporter at the end of the case.)

So in the case of Hafner *v.* Irwin, 1 Iredell, 490, which grew out of the making of a deed of trust by one Dwight to the plaintiff, Hafner, to secure certain creditors named thereon, it was said:

"There was evidence tending to show that it was a condition of this instrument, and as understood between the parties thereto, that it should not be registered nor put in use, but kept a secret from the world until after the 20th of February ensuing the date. * * * * There was also evidence tending to show that it was a further part of the agreement between the parties that the transaction should be kept secret, at all events until the debtor should escape beyond the reach of the process of his creditors. * * * * We need not and can not lay down as a rule of law that those who take securities from a debtor about to abscond must apprise creditors of his intention to place himself beyond their reach, under penalty of forfeiting such securities; but we feel ourselves justified in holding that when secrecy is part of the consideration of such securities, the securities are contaminated thereby, and ought not to be regarded as given *bona fide*."

In Hildeburn *v.* Brown, 17 B. Mon., 779, a mortgage was executed by one Sherwood to the plaintiffs, which they withheld from record. Commenting on that fact, the court said:

"The petition of appellants avows that the arrangement between their agents and Sherwood was to withhold the mortgage from registration for the purpose of sustaining the latter in business, and not to record the same unless there was danger of Sherwood's failure. * * * * The effect of this arrangement, though it may not have originated in any actual fraudulent or evil purpose, was to secrete from the public eye the true condition of the debtor, and thereby enable him, under the semblance of being the owner of unincumbered

real estate, to deceive and mislead other persons by inducing them, upon the faith of his supposed unembarrassed condition, to give him credit which would otherwise have been withheld. Such contrivances or acts, though not designed to perpetrate an actual fraud upon other persons, have an inevitable tendency that way, and are obviously opposed to the general policy of the law requiring the public registration of all liens and incumbrances upon property permitted to be retained and claimed by debtors.

"If not directly within that class of acts which the law denominates constructive frauds, it approximates so nearly to it that the party avowing himself a participant in such transaction ought not to receive the countenance or aid of the chancellor in enforcing any lien or claim growing out of it as against a third person."

The case of Neslin *v.* Wells, Fargo & Co., decided by this court at the present term, arose in the Territory of Utah, where the law permitted but did not require the registration of mortgages, but where there was a general custom to record such instruments. Neslin, the vendor of land, took from Smith, his vendee, a mortgage to secure a part of the purchase-money, but did not file it for record until after a subsequent mortgage executed by the vendee on the same land, to one Kerr, had been filed for record, Kerr having no notice, actual or constructive, of the prior mortgage to Neslin. It was held by the court, Mr. Justice Matthews delivering its opinion, that "under the circumstances of the case there arose a duty on the part of Neslin, the vendor, to record his purchase-money mortgage, towards all who might become subsequent purchasers for value in good faith, a breach of which in respect to Kerr, the subsequent mortgagee without notice, constituted such negligence and laches as in equity requires that the loss which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned." (See, also, Worseley *v.* De Mattos, 1 Burr, 467, and Tarback *v.* Marbury, 2 Vern., 510.)

Opinion of the court.

The principles upon which these decisions are based are, in our opinion, conclusive of this case. None of the cases cited disclose such a premeditated and contrived purpose to deceive and defraud other creditors of the mortgagor as appears in this. We are of opinion, therefore, that the mortgage executed by Allen to Allen, Stephens & Co., on November 18, 1874, which the complainants in this case seek to foreclose, is a fraud upon the creditors of Allen and void at common law.

We further declare that a mortgage executed by an insolvent debtor, with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the bankrupt act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under the letter of the bankrupt act. Where all the other circumstances necessary to render the mortgage void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and void as against its spirit.

The conduct of the mortgagees in this case shows them to be without claim to the consideration of a court of equity. On the contrary, it clearly appears to be the duty of the court to take care that they shall not reap the fruits of their fraudulent practices. Their assignee of the mortgage, the Charter Oak Life Insurance Company, stands in no stronger position. The decree of the Circuit Court must be affirmed.

AFFIRMED.

THE CITY OF LOUISIANA v. ELIZABETH W. TAYLOR.

April 24, 1882.

1. The city of Louisiana had, under the twenty-ninth section of the legislative act incorporating the Louisiana and Missouri River Railroad, the right to subscribe to the stock of said railroad, and, under the tenth section of the city charter passed February 16, 1865, the right to issue bonds to pay for such subscription, if authorized by popular vote.
2. Nor is this power so conferred by the charter repealed by the Constitution of Missouri that took effect on July 4, 1865, that being entirely prospective; nor by the seventeenth section of the general railroad law of Missouri of 1866, which is a mere enabling act, containing no words of prohibition and not inconsistent with the special power previously conferred by the charter.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

James O. Broadhead and *David P. Dyer*, for plaintiff in error.

Clinton Rowell and *Thomas K. Skinker*, for defendant in error.

MATTHEWS, J.—The defendant in error, a citizen of Illinois, brought this action against the plaintiff in error, a municipal corporation of Missouri, to recover the amount alleged to be due upon certain bonds and coupons issued by the latter in payment of a subscription to the capital stock of the Louisiana and Missouri River Railroad Company, a corporation authorized by law to construct, and which has constructed in pursuance thereof, a railroad from the city of Louisiana to the Missouri River. The bonds sued on were dated, some in September, others in October and in November, 1869, and matured on January 1, 1876, 1877, and 1878, and, together with coupons falling due since January, 1876, remain unpaid. All coupons maturing previously, together with the principal of a portion of the whole issue of bonds, had been paid by taxes regularly levied and collected by the proper authorities of the city from the year 1867 to 1876. Certificates of the stock in the railroad company were issued in pursuance of the subscription, and were ac-

cepted by the city, which has ever since exercised its rights as a stockholder.

The defense was that the bonds were void for want of power in the municipal corporation to issue them.

There was a judgment in favor of the plaintiff below, to reverse which this writ of error is prosecuted.

Each of the bonds sued on contains a recital that it "is issued by the city of Louisiana under authority of the General Assembly of the State of Missouri, entitled 'An act incorporating the Louisiana and Missouri River Railroad Company,' approved March 10, 1859; also an ordinance of the city council of the city of Louisiana, No. 502, passed June 12, 1866."

The reference to the railroad charter is to the twenty-ninth section of the act of incorporation, which reads as follows:

"SEC. 29. It shall be lawful for the County Court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such County Court may appoint an agent to represent the county, vote for it, and receive its dividends; and any city, town, or incorporated company may subscribe to the stock of said railroad company and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of said city, town, or incorporation."

The tenth section of the act incorporating the city of Louisiana, passed February 16, 1865, was as follows:

"The city shall have power to subscribe for stock in any incorporative railway company connecting with the city of Louisiana, or give any bonus to any institution of learning, by submitting an ordinance making the appropriation, or authorizing the issue of bonds for any such purpose, to a vote of the qualified voters of the city, at any general election held in the city,

or at any special election expressly ordered, at which election the majority of the votes cast shall be for such ordinance; provided the debt of the city shall never exceed one hundred and fifty thousand dollars."

In pursuance of this provision of the city charter the city council, on June 12, 1866, passed ordinance No. 502, recited in the bonds in suit, providing for an election to be held on the first Tuesday in July, 1866, on the proposition to subscribe for stock in the Louisiana and Missouri River Railway Company for an amount not exceeding $50,000.

The election provided for by this ordinance was in fact held, the result of which was that 176 votes were cast in favor of the proposition to 46 votes in the negative.

Thereupon the city council passed an ordinance authorizing the subscription of $50,000 to the capital stock of the railway company, and the issue of bonds for the payment of the same. The subscription was made and the bonds delivered.

The Constitution of Missouri that went into operation July 4, 1865, contained the following provision:

"SEC. 14. The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

It also contained this provision:

"ART. II, sec. 3. All statute laws of this State now in force not inconsistent with this Constitution shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly."

At its first session after the adoption of this Constitution the General Assembly of Missouri passed a general railroad law, (Rev. Stat. Missouri 1865, p. 372,) which it is claimed went into effect March 19, 1866, and which contained the provision following, to wit:

"It shall be lawful for the County Court of any county, the

city council of any city, or the trustees of any incorporated town to take stock for such city, county, or town in, or to loan the credit thereof to, any railroad company duly organized under this or any law of this State; provided that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription."

At the same session of the Legislature it was also enacted (Rev. Laws of Missouri, ch. 224, sec. 6, p. 882) that "all acts and parts of acts of a private, local, or temporary nature, or specifically applicable to particular cities or counties, in force on the 1st day of November, A. D. 1865, not repealed by or repugnant to the provisions of the general statutes or some act of the present General Assembly, shall continue in force or expire according to their respective provisions or limitations."

These are all the statutory provisions supposed by counsel for the respective parties to have any material bearing upon the question at issue.

The power to subscribe to the capital stock of the railroad company is expressly given to the city of Louisiana by the twenty-ninth section of the charter of the former. Whether that grant of power carries with it the incidental authority to pay its subscription by an issue of bonds, or whether, upon a fair construction of the terms of that section, the exercise of such an authority is within the meaning of the law, it is not necessary for us to discuss or decide; for whatever might be a proper construction of the section if it stood by itself, we think it must, at the time when the bonds in suit were issued, be interpreted in connection with the tenth section of the city charter, which had in the meantime been enacted. That section, in explicit terms recognized, and thereby conferred upon the city, the power to issue bonds in payment of its subscription to the stock of any railway company connecting with it, upon condition, however, of the approval of the ordinance authorizing the issue by a majority of the votes cast at an

election held for that purpose; and we think that limitation must be taken, thereafter, as imposed upon the power granted to the city in the railway charter. Such was, in fact, the construction put by the city upon its own powers, for the bonds in suit purport to be issued in pursuance of authority conferred by a majority of the votes cast at such an election, approving the ordinance passed to that end.

The ordinance submitted to the vote of the electors at that election, authorizing the issue of the bonds, was, we think, in all respects in conformity with the law, and sufficient. But it is contended by the plaintiff in error that the provision of the city charter, in accordance with which it was passed, had been repealed before the vote was taken and the subscription made.

It has been repeatedly held by the Supreme Court of Missouri, in decisions approved and followed uniformly by this court, that such repeal is not the direct and immediate result of the Constitution itself; that, on the contrary, the prohibition contained in that instrument is a limitation merely upon the power of the Legislature for the future, so that it should not thereafter grant authority to municipal corporations to become stockholders in companies except upon the terms expressly mentioned, and that all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision. (County of Callaway *v.* Foster, 93 U. S., 570; County of Scotland *v.* Thomas, 94 U. S., 682; County of Henry *v.* Nicolay, 95 U. S., 619; County of Ray *v.* Vansycle, 96 U. S., 675; County of Schuyler *v.* Thomas, 98 U. S., 169; County of Cass *v.* Gillett, 100 U. S., 585.)

It is argued, however, that the repeal of the provision in question was affected by the seventeenth section of the general railroad law, which it is claimed took effect March 19, 1866, before the passage of the ordinance No. 502, June 12, 1866.

But this position, in our opinion, is also untenable. The act in question is an enabling statute, passed in execution of the powers authorized by the Constitution then recently adopt-

ed. It was general in its provisions, conferring power upon any county, city, or town to take stock in or to loan its credit to any railroad company duly organized under any law of the State upon the assent of two-thirds of the qualified voters thereof. It does not revoke any previous grants of similar authority. It repeals no existing provisions of law. It contains no words of prohibition. The sixth section of chapter 22, of the same session, "of the general statutes and their effect," &c., (Rev. Stats. Missouri, 882,) expressly continues in force "all acts and parts of acts of a private, local, or temporary nature, or specifically applicable to particular cities or counties, in force on the 1st day of November, A. D. 1865, not repealed by or repugnant to the provisions of the general statutes or some act of the present General Assembly," until they expire according to their respective provisions or limitations. There is no repugnancy between the tenth section of the charter of the city of Louisiana and the seventeenth section of the general railroad law. One is a definite, express, and special provision in reference to such railways only as connect with the city; the other has relation to possible proposals for subscription to the stock of any railroad company, whether its railroad connected with the city or not. The subject of the two statutes are not the same, and there is no such inconsistency between them as that both may not stand and operate. It would not be legitimate to construe the seventeenth section of the general railroad act as if it forbade everything it did not authorize, and it is only by such a construction that the repugnancy with the tenth section of the charter of the city can be made to arise.

The very question mooted here was decided by the Supreme Court of Missouri in the case of The State *ex rel.*, &c., *v.* Macon County Court, 41 Miss., 453, at the October Term, 1867. It was there said by the court: "There is no such inconsistency between the acts that they may not both stand and be carried into operation. A general prohibition against subscribing for stock in any corporation may well subsist with a permission to subscribe for stock in a particular corporation. Besides, the

seventeenth section of the general railroad law, with which the enabling act is supposed to conflict, uses no negative words. It uses words to express and permit future acts, and there is nothing to show that it intended to operate on existing or past laws even by implication. It was framed after the Constitution was adopted, and the conclusion is undeniable that it was intended simply to make the law conform to and carry out the fourteenth section of the eleventh article of that instrument."

This decision is upon the very point, and is a judgment of the Supreme Court of the State in a case which, in its circumstances, we find it impossible to distinguish from the present. Its authority was confirmed by the decision of the same court in Smith *v.* County of Clark, 54 Miss., 58.

This view of the case disposes of all objections to the judgment of the Circuit Court. It is accordingly affirmed.

AFFIRMED.

ST. ANNA'S ASYLUM FOR THE RELIEF OF DESTITUTE FEMALES AND HELPLESS CHILDREN OF ALL RELIGIOUS DENOMINATIONS v. THE CITY OF NEW ORLEANS.

April 24, 1882.

1. A section of the charter of a Louisiana charitable institution, enacted in 1853, provides that all its property shall be exempt from taxation either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding: *Held*, That this exemption extended to all property used by the corporation for the purpose of raising revenue, whether such property was acquired before or after the adoption of the State Constitution of 1868 and the legislation adopted in pursuance thereof requiring all property to be equally taxed; and that the one hundred and eighteenth section of the State Constitution of 1868 and the legislative act of 1871 in pursuance thereof impair the obligation of a contract in so far as they attempt to tax such property of the charitable institution.
2. And the four hundred and thirty-eighth article of the civil code, adopted in 1825, on the dissolution of corporations, which is a part of all charters granted by the Legislature, authorizes the amendment of the charter, if at all, only on making proper reimbursement, which in the case of a tax law would balance the tax.

Opinion of the Court.

ERROR to the Supreme Court of the State of Louisiana.

E. T. Merrick and *George W. Race*, for plaintiff in error.

Henry C. Miller, for defendant in error.

BRADLEY, J.—This case comes before us on a writ of error to the Supreme Court of the State of Louisiana, for the purpose of reviewing the judgment of that court, which sustained the validity of a certain tax imposed by the authorities of the city of New Orleans upon the property of "St. Anna's Asylum for the Relief of Destitute Females and Helpless Children of all Religious Denominations."

The plaintiff in error is a charitable institution, incorporated by an act of the Legislature of Louisiana approved April 29, 1853, for the purposes indicated by its name. The charter gave the corporation perpetual succession and power to take, purchase, possess, and enjoy all kinds of property whatever, real or personal, by gift, grant, sale, bequest, exchange, or by any other mode of conveyance or transfer whatsoever, and the same to sell, convey, or dispose of, under the restrictions therein provided, and directed that they should administer the same for the furtherance of the object of the incorporation and in accordance with the conditions of the charter; with a provision that all acceptances of immovable property, and all alienations of immovable property and stocks, should be signed by the president and treasurer, after the declared will of a majority of the board of directors had been duly inscribed on the minutes of the corporation. It appointed a first board of directors, and provided for annual elections thereafter, and for the appointment of a president and other officers, and declared that the president and directors should superintend, manage, and control the affairs and interests of the corporation.

The sixth section declared as follows:

"SEC. 6. *Be it further enacted, &c.*, That the said corporation shall enjoy the same exemption from taxation as was enacted in favor of the 'Orphan Boys' Asylum of New Orleans'

by the act approved March 12, 1836, entitled 'An act for the relief of the Orphan Boys' Asylum of New Orleans.'"

The act relating to the "Orphan Boys' Asylum of New Orleans" referred to in this section declared as follows:

"That from and after the passage of this act all the property, real and personal, belonging to the Orphan Boys' Asylum of New Orleans be and the same is hereby exempted from all taxation, either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding."

The proofs show that under the charter thus granted the corporation was duly organized, and, by means of donations, erected an asylum, and has always fulfilled the objects of its organization. The property on which the tax in question was imposed was procured in 1874, and was assessed in the tax list at $90,000. The following admission with regard to it appears in the record:

"Now, therefore, it is admitted [as was done in the lower court] that the defendant acquired said cotton-press mentioned in the tax bill and answer filed by defendant, after 1874, by devise, bequest, and legacy from Dr. W. N. Mercer, and that they were the owners of the same when said assessment of $1,350 of city taxes was made by the city; that no inmates of the asylum are kept upon the premises, and that the revenues of the cotton-press on which said assessment is made are applied to the keeping and maintaining the objects of charity mentioned in the defendant's act of incorporation, viz., to the support and maintenance and relief of destitute females and helpless children of all religious denominations, as intended by the charter, and that said asylum is, and has been since its organization, in active and efficient operation (as shown by the evidence) in the city of New Orleans."

The proofs further show that the corporation largely relies on the rents of this property for enabling it to carry on its benevolent work.

The tax in question was imposed in 1876 under the supposed authority of the Constitution of 1868 and legislation adopted

in pursuance thereof. The one hundred and eighteenth article of that Constitution declared as follows:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes."

In conformity with this provision the Legislature of Louisiana in 1871 passed a law declaring that all taxes levied by the city of New Orleans shall be assessed equally upon every description of property, both real and personal; but by another act, passed at the same session, it was declared that public hospitals, asylums, poor-houses, and all other charitable institutions for the relief of indigent and afflicted persons, and the lots of ground appurtenant thereto and used therewith, and all their furniture and equipments, so long as the same shall be used for that purpose only, shall be exempt from taxation.

The corporation resisted the payment of the tax, and the usual proceedings for its collection were instituted in the Third District Court for the parish of Orleans. The corporation filed an answer setting up the exemption from taxes contained in its charter, and claiming that it was a contract, and contended that the Constitution of 1868 and the statute passed in pursuance thereof impaired the obligation of said contract, in violation of the tenth section of article 1 of the Constitution of the United States. The court below gave judgment in favor of the city, and an appeal was taken to the Supreme Court of Louisiana, and the judgment was affirmed. We are now called upon to review this decision.

The language of the exemption is so explicit and so broad, and comes in after so many allusions to property which it is supposed the corporation might acquire other than that which would be directly used for food and shelter to the destitute and helpless persons under its care, that no doubt can be entertained as to its literal application to all the property of the society which it would be lawful and proper for it to

possess. The funds on which it relies for carrying on its work, however invested, whether in stocks, real estate, or otherwise, no less than the asylum building itself, are clearly embraced in the terms of the exemption; and to exclude them from its operation would require the insertion or addition of words which the Legislature did not see fit to express. Undoubtedly, if the corporation should acquire property not needed or used for carrying on the institution, it would be an act outside of the objects and purposes of the charter, and *ultra vires;* and as to such property it could not, in its own wrong, justly claim the benefit of the exemption. But the property in question is not obnoxious to this objection; it directly contributes to the support of the institution, and is held for that purpose alone.

Indeed, it is not on any assumption that the language of the exemption does not extend to the property taxed that the Supreme Court of Louisiana bases its judgment. The main ground upon which it relies is that the charter was granted and accepted under a standing law of the State, by which the Legislature was authorized to abrogate the charter of any corporation; and it was argued that the power to abrogate included the lesser power to alter and amend. This law is contained in the four hundred and thirty-eighth article of the Civil Code adopted in 1825, being a modification of a similar article in the Code of 1808, book I, title X, chapter III. In the Code of 1825 it reads as follows:

"CHAPTER III.—*Of the dissolution of corporations.* (Art. 438.) —A corporation legally established may be dissolved: 1. By an act of the Legislature, if they deem it necessary or convenient to the public interest; provided, that when an act of incorporation imports a contract, on the faith of which individuals have advanced money or engaged their property, it cannot be repealed without providing for the reimbursement of the advances made, or making full indemnity to such individuals; 2. By the forfeiture of their charter, when the corporation abuse their privileges or refuse to accomplish the conditions on which such privileges were granted, &c."

Opinion of the court.

The counsel for the plaintiff in error contends that this article has reference only to the absolute dissolution of a corporation, and not to a mere alteration of its charter; and, from its correlation to other parts of the title, this seems to be a very probable view of its office. But if it be construed in the large sense contended for by the counsel of the city, the qualification with which it is accompanied in the proviso is very important and not to be ignored. This qualification requires reimbursement or indemnity to those who have made advances upon the faith of the charter of incorporation. Nothing of the kind has been attempted in this case. As the corporation has not been dissolved, but is continued in existence, and still represents those who contributed to its establishment, the corporation itself is the only property to receive indemnity; and no indemnity short of the amount of the tax imposed would be adequate. The indemnity and the tax would mutually balance or neutralize each other. In other words, proper indemnity would require a revocation or nullity of the tax.

It is suggested, however, by the Supreme Court in its opinion that the reserved power contained in the code has no application to this case, because the property upon which the tax in question was imposed was acquired by gratuitous donation, after the adoption of the Constitution of 1868, and consequently, as the court infers, after the repeal of so much of the charter as exempted from taxation the property not employed within the limits of exemption allowed by that Constitution. "When a case of prior acquired property," says the court, "presents itself, it will be time enough to express our opinion thereon." But this argument presupposes the existence of a right to repeal the provisions of the charter as to future acquisitions, without qualification or condition. This seems to us a begging of the question at issue. The contract did not apply only to property in existence when the charter was granted, nor only to that which was in existence when the Constitution of 1868 was adopted, but to all that might after-

wards be acquired in the fulfillment of the purposes of the institution. If the present asylum should be destroyed, and a new one erected on a different piece of ground, the argument of the court would be equally applicable to such newly-acquired property as to the property in question. The Constitution itself did not exempt any property. It only gave the Legislature the power—to be exercised or not in its discretion—to exempt property actually used for church, school, and charitable purposes. The Legislature has seen fit to make this exemption, but it was not obliged by the Constitution to do so. The argument of the Supreme Court would go to the extent of declaring that the abrogation of the contract, affected by the Constitution of 1868, was valid as to all after-acquired property, whether indemnity was provided or not; and this amounts to saying that the Legislature or people of Louisiana had absolute power to pass a law impairing the obligation of the contract without any condition or qualification whatsoever.

We cannot concur in this view. We think that the power of abrogation or alteration was qualified by the duty of providing indemnity to the full extent of the damage or burden caused by such change. This conclusion seems to us so obvious as to require no extended argument in its support.

This opinion might be extended by an examination of authorities. We might refer to the case of The Home of the Friendless *v.* Rouse, 8 Wall., 430, which is almost on all-fours with the present case; we might go back to the case of Dartmouth College *v.* Woodward, and the cases since decided, and review all the reasons on which they were grounded; we might dilate on the legislative reasons for granting immunity from taxes to such charitable institutions as that of the plaintiff in error, prominent among which would doubtless be the fact that the support and maintenance extended to the objects of the charity relieves the State from a burden which would involve a much larger amount of taxation than that which it waives by granting the exemption;—but such a review would

be but a repetition of what has been said before, and much of it would be out of place.

It is proper, however, that we should notice one or two cases which the counsel for the city supposes to be favorable to their views, and on which they place considerable reliance.

These are the cases of Tucker *v.* Ferguson, 22 Wall., 575, and West Wisconsin Railroad Co. *v.* Supervisors, 93 U. S., 595. We think that they do not apply to the case now under consideration. In the first place, the Constitutions of Michigan and Wisconsin, in which States those cases arose, reserved to their Legislatures, respectively, the power to alter, amend, and repeal charters of incorporation. In the next place, in those cases the exemption granted was held to be gratuitous on the part of the State, no consideration passing therefor from the companies. It was no part of their charters of incorporation, and therefore formed no consideration for their acceptance; whereas in the present case the exemption was expressed in the charter itself, and was one of the inducements offered for its acceptance and for making donations for the establishment of the institution.

It is also said that in order to constitute a contract the grant ought to be clear and free from all ambiguity and doubt, and not susceptible of a different construction. We think it is so in this case. The contract is not a matter of inference or presumption. It is distinctly expressed in the act of incorporation. Indeed, a clearer case could hardly be made. The addition of a declaration that the exemption given should not be withdrawn, would not have added to its force.

We are well aware of the forcible language which has been used in previous cases in reference to the importance to the State of the governmental function of taxation; the caution that ought to be exercised in maintaining a claimed exemption from taxes; the clearness and certainty which the grant should exhibit. We concur in all that has been said by this court and many State courts on the subject. But where the language is clear, and the intention to grant the exemption

apparent, the court has never hesitated to give it force and effect. And, as before said, we think it difficult to conceive a grant more clearly expressed than that in the present case; and unless we are disposed to reverse the previous decisions of this court, we cannot hesitate what judgment we ought to give.

We are of opinion that the imposition of the tax in question, contrary to the express terms of the charter and without any provision for compensation or indemnity, was not a legitimate exercise of the power of dissolution reserved in the code; and that the one hundred and eighteenth section of the Constitution of 1868, and the legislative act by virtue of which the said tax was imposed, as construed and applied to the circumstances of this case, are in violation of the tenth section of article 1 of the Constitution of the United States.

Our conclusion is that the judgment of the Supreme Court of Louisiana must be reversed, and that the cause be remanded, with instructions to reverse the judgment of the Third District Court of the parish of Orleans and to render judgment in conformity with this opinion.

MILLER, J. (dissenting.)—I dissent from this judgment, because I understand that no statute shall be held to grant exemption from taxation unless its language imperatively requires it.

I do not think that the language of the statute under which the exemption is claimed in this case requires that all property acquired by the institution after the passage of the act shall be exempted, especially in regard to a cotton-picking machine, which can only be of value as it is used in a business operation in competition with others who must pay heavy taxes.

Mr. Justice FIELD concurs with me in this dissent.

REVERSED.

Statement of the case.

THE UNITED STATES v. SELAH C. CARLL.

April 24, 1882.

An indictment on section 5431 of the Revised Statutes, alleging, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely-made, forged, counterfeited and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited, and altered, is insufficient, even after verdict.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

This was an indictment, found in the Circuit Court, on section 5431 of the Revised Statutes, by which it is enacted that "every person who, with intent to defraud, passes, utter, publishes, or sells any falsely-made, forged, counterfeited, or altered obligation or other security of the United States, shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than fifteen years."

Each count of the indictment alleged that the defendant, at a certain time and place, "feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter, and publish upon and to the said Bank of the Metropolis a falsely-made, forged, counterfeited, and altered obligation and security of the United States," (which was set forth according to its tenor,) against the peace and contrary to the form of the statute.

The defendant, having been tried before Judge Benedict, and convicted by the jury under instructions which required them to be satisfied of the facts alleged, and that the defendant, at the time of uttering the obligations, knew them to be false, forged, counterfeited, and altered, moved in arrest of judgment for the insufficiency of the indictment. At the hearing of this motion before Judge Blatchford and Judge Benedict they were divided in opinion upon the question, stated

in various forms in their certificate, but in substance this: Whether the indictment setting forth the offense in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited, and altered, was sufficient, after verdict, to warrant judgment thereon.

S. F. Phillips, Solicitor-General, for the United States.

William C. Roberts, for the accused.

GRAY, J.—In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. (United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Simmons, 96 U. S., 360; Commonwealth *v.* Clifford, 8 Cush., 215; Commonwealth *v.* Bean, 11 Cush., 414; Commonwealth *v.* Bean, 14 Gray, 52; Commonwealth *v.* Filburn, 119 Mass., 297.)

The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

Statement of the case.

This indictment, by omitting the allegation contained in the indictment in United States *v.* Howell, 11 Wall., 432, and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a "defect or imperfection in matter of form only," within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be

ANSWERED IN THE NEGATIVE.

LEWIS HAMMOCK, ISAAC B. SWAN, ET AL. *v.* THE FARMERS' LOAN AND TRUST COMPANY.

April 24, 1882.

1. A judge of a Circuit Court in Illinois cannot, in vacation, appoint a receiver of a railroad corporation. The possession of a receiver so appointed is not that of the court.
2. Section 49 of chapter 37 of the Revised Statutes of Illinois 1874, p. 332, is to be construed as if there was no comma between the words "to hear and determine motions" and the words "to dissolve injunctions." Punctuation is no part of a statute.
3. The statutes of Illinois giving the right to redeem mortgaged lands sold under decree, do not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty, and franchises so mortgaged should be sold as an entirety, and without the right of redemption given by statute.
4. The chattel-mortgage statute is inapplicable to an ordinary railway mortgage.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

To secure the payment of its bonds, aggregating the sum of six hundred and sixty thousand dollars, and issued for the purpose of raising money as well for its mining and manufacturing business as for the completion and maintenance of its

road, the Chester and Tamaroa Coal and Railroad Company, an Illinois corporation, executed on the 12th day of April, 1871, a deed of trust containing such conditions and provisions as are usually inserted in railway mortgages. It embraced the entire road of the grantor, then made or thereafter to be constructed from Chester, in Randolph county, to Tamaroa, in Perry county, together with the right of way, and all the real and personal property then owned or subsequently acquired, and used or appropriated for railroad purposes; also, its privileges and franchises for holding, operating, and maintaining the road, together with any income derived from the property, not applied to the construction and repair of the road, the conduct of the business of the company, its current expenses, or the purchase of equipments, tools, and machinery. Subsequently the mortgagor company was consolidated with the Chester and Iron Mountain Railroad Company, the consolidated company taking the name of the Iron Mountain, Chester and Eastern Railroad Company.

From the 1st day of October, 1874, until the 5th day of June, 1876, the railroad and other property included in the mortgage was in the possession of D. C. Barber, as receiver, in a creditor's suit instituted by one Maxwell in the Circuit Court of the United States for the Southern District of Illinois. On the last-named day, in conformity with a stipulation signed by the attorneys in that suit, Barber was discharged as receiver, without being required to render an account of his acts, and the bill of Maxwell was dismissed at his costs. The present transcript does not show the grounds upon which Barber was appointed receiver, perhaps for the reason disclosed in an affidavit, that the bill filed by Maxwell was not to be found among the files of his suit.

On the day succeeding Barber's discharge as receiver, Hammock, assignee of two judgments, (aggregating less than one thousand dollars,) with returns of no property against the Iron Mountain, Chester and Eastern Railroad Company, and suing in behalf of himself and such judgment creditors as might

unite with him, presented his bill in equity to the judge of the Circuit Court of Perry county, Illinois, in vacation, "at chambers," in Washington county, Illinois, praying the appointment of a receiver of the railroad company and its effects, with authority to hold and administer the same under the direction of the court, and out of the net income arising therefrom to pay the judgments held by complainant and others. The only grounds assigned in the bill for a receiver are the indebtedness of the company, the returns against it of *nulla bona*, its insolvency, and its refusal to pay the judgments outstanding against it. The judge, without notice to the company, appointed Thomas M. Sams receiver, and made an order requiring the railroad company, its officers, servants, and agents, to deliver to him all of its property and effects of every kind, upon his presenting the certificate of the clerk of the court that he, Sams, had filed his bond as receiver in the penal sum of $15,000, with certain named sureties, (Barber, then recently the receiver in Maxwell's suit, being one of them,) conditioned that he would account for all property and effects coming to his hands as receiver under the order and direction of the court. By the terms of the order Sams was authorized to use and operate the railroad, and pay all expenses incurred in its operation as far back as October 1, 1874, nearly two years prior to his appointment. The bill of Hammock, with the foregoing order indorsed thereon, was filed in the clerk's office on the 7th of June, 1876, and Sams, having executed the required bond, took possession of the railroad and all the property and effects of the company.

On the 13th day of June, 1876, the Farmers' Loan and Trust Company—without knowledge, as we infer from the record, of the suit in the State court—commenced proceedings in the court below for the foreclosure of the before-mentioned mortgage, and to obtain a decree for the sale of all the property embraced by it, in satisfaction of the interest and principal of the bonds thereby secured, the whole amount of which had, under the terms of the mortgage, become due by reason of the

continued default of the company in meeting the interest as it matured. The bill (verified under date of June 2, 1876) and the supplemental bill charged that the consolidated company was insolvent; that its entire property was inadequate for the payment of the mortgage debt; that divers persons, by defaults and collusions with Barber, late receiver, had obtained judgments against the company, and had levied, or were about to levy, upon its rolling stock and other movable property, with the intent to deprive the trustee and those it represented of the benefit of their security; that the company itself was a party to that fraudulent collusion; that the bill of Maxwell had been dismissed, and Barber, as receiver, discharged, to the end that such levies might be made; that these facts had only then come to complainant's knowledge; and that if time was taken to give notice of an application for an injunction and a receiver, great and irreparable loss would ensue to the trustee and those whose interests it represented.

Upon the filing of the original and supplemental bill the Federal court appointed a receiver, with direction to take possession of the mortgaged property, and at the same time issued an injunction against judgment creditors interfering with or taking possession of it. A few days thereafter the Farmers' Loan and Trust Company filed in the office of the clerk of the Perry Circuit Court its petition to be made a party defendant in the suit of Hammock, also its answer and cross-bill therein, and its petition, accompanied by proper bond, for the removal of the suit into the Circuit Court of the United States. An application was subsequently made by the complainant to the judge of the State court, in vacation, to discharge Sams, as receiver, upon the ground, among others, that he was illegally appointed in the vacation of court. That motion was denied, and thereupon the company made an application, based upon the before-mentioned papers, to the judge, in vacation, to be admitted as a party to Hammock's suit. But in reference to that application the judge declined to take action, upon the ground that he could not legally do so in the vacation of his court.

Statement of the case.

On the 19th day of July, 1876, the Farmers' Loan and Trust Company, having filed a certified transcript of the proceedings in the Hammock suit, including copies of all the foregoing papers, moved the Federal court to take jurisdiction of that suit. That motion—Mr. Justice Davis and the district judge concurring—was sustained, and an order made that the Hammock suit proceed in that court as if originally commenced there, and be consolidated with the mortgage suit. It was further ordered that Sams surrender to the receiver of the Federal court all property in his hands as receiver, and pay over all funds by him in that capacity collected. That order was immediately executed, and thenceforward the mortgaged property was in the actual and exclusive custody of the Federal court by its receiver.

At the November Term, 1876, of the State court a motion was made by Hammock to strike from the files of his suit the answer, cross-bill, and the petition for the removal of the cause, previously filed therein by the Farmers' Loan and Trust Company, upon the ground that they had been so filed without leave of court, and because that company was not a party to the suit. That motion was sustained on the 4th day of May, 1877, and all of those papers were stricken from the files.

Nothing occurred in the progress of the consolidated cause which need be referred to, except that the court, in response to a suggestion by the attorney-general of the State, and by consent of parties, (all the judgment creditors interested in Hammock's suit having appeared, in some form, in the consolidated cause, saving, however, all questions as to the jurisdiction of the Federal court,) an order was made, under which the receiver surrendered to county collectors the rolling stock and personal property of the company in his hands to be levied on and sold. It was levied on and sold for State, county, school, and other taxes assessed in Randolph and Perry counties upon the property in the receiver's hands for the years 1873 to 1876, inclusive. That portion sold in Randolph county brought $6,053.92, which, after deducting costs of sale, satisfied in full

the taxes due in that county on the real and personal estate of the railroad company, and all of the tax on its capital stock except $999.93. The sale in Perry county netted the sum of $5,165, which satisfied in full the taxes due and collectible in that county on the company's real and personal estate, and all of the capital stock tax except $852.39.

A final decree was made on the 11th day of January, 1878, for the sale of the mortgaged property, including the franchises of the company as an entirety, to satisfy the principal and interest due on the bonds, then amounting to $940,625.40. The sale was directed to be made "without appraisement and without reference, and not subject to any law or laws of Illinois allowing redemption from mortgage sales, but absolutely without redemption." Henry C. Cole became the purchaser of the entire property at the sum of $50,000. The sale was subsequently confirmed and a deed made to the purchaser, who was let into possession on the 26th day of April, 1878.

On the 17th day of October, 1878, the Wabash, Chester and Western Railroad Company, an Illinois corporation, to which had been conveyed by Cole, after the confirmation of his purchase, the railroad and other property sold under the foregoing decree, represented to the court below, by petition, that Hammock and other judgment creditors, parties to the consolidated cause, had then recently caused Sams, still pretending to be the legal receiver of the property sold in the foreclosure suit, to advertise the same for sale, without redemption, under an order or decree of the Perry Circuit Court, made in Hammock's suit after the execution of the final decree in the foreclosure suit, to wit, on the 11th day of May, 1878; and that, unless restrained, such sale would be had in disregard of the decree of the Federal court. Upon this petition a temporary injunction was issued, and Hammock, Sams, and others were required to show cause why they should not be attached for contempt of court.

Upon final hearing the temporary injunction of October 17, 1878, was, by an order entered on the 17th day of January,

1879, perpetuated, and Sams, Hammock, and their associates were enjoined from taking any steps in execution of the decree of the Circuit Court of Perry county, from selling any part of the railroad property theretofore sold under the decree of the court below, and from interfering with it in any manner.

The present transcript embraces two appeals, one from the several orders and the final decree under which the mortgaged property was sold, and the other from the final order or decree of January 17, 1879.

J. K. Edsall, for appellants.

R. E. Williams, for appellee.

HARLAN, J.—Whether the State court or the Circuit Court of the United States first acquired control and possession of the property conveyed in trust by the Chester and Tamaroa Coal and Railroad Company, is the first question to which our attention will be directed. If, when seized under the order of the Federal court, it was in the custody of the State court by its receiver, then, it is claimed, all the proceedings in the former, so far at least as their regularity and validity depended upon possession of the property, were in violation of the established principles governing courts of concurrent jurisdiction in their relation to each other. (Taylor *v.* Carryl, 20 How., 583; Freeman *v.* Howe, 24 How., 450; Hagan *v.* Lucas, 10 Pet., 400; Peck *v.* Jenness, 7 How., 612.)

The solution of this question, it must be conceded, depends upon the authority which the judge of the State could lawfully exercise in vacation. For if, under the laws of the State, he had no power in vacation to appoint a receiver of the property and effects of a railroad company, the order under which Sams took possession was a nullity, and his custody was not that of the court which he assumed to represent. Counsel for appellants admits that, except to the extent expressly permitted by statute, the judge of the State court

could not exercise any judicial functions in vacation. Such, beyond question, is the established doctrine of the Supreme Court of Illinois. In Blair *v.* Reading, 99 Ill., 609, the court said: "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation except such as are expressly authorized by statute." In Devine *v.* People, 100 Ill., 290, the language of the court was that "judges can exercise no judicial functions in vacation except such as they are especially authorized to do by statute." (Keith *v.* Kellogg, 97 Ill., 147.)

It is stated by counsel, and our examination verifies the correctness of the statement, that in the few cases in which the statutes of Illinois make special provision for the appointment of a receiver, the power is conferred upon the court and not upon the judge thereof. (Rev. Stat. Ill. 1874, sec. 25, p. 290; Id., sec. 24, p. 553; Id., sec. 88, p. 613.)

But the action of the judge of the State court is attempted to be sustained under the forty-ninth section of chapter 37 of the Revised Statutes of Illinois enacted in 1874, (p. 332,) which is in these words:

"SEC. 49. *Powers of judges in vacation.* The several judges of said courts [judges of the Circuit Courts and of the Superior Court of Cook county] shall have power, in vacation, to hear and determine motions, to dissolve injunctions, stay or quash executions, to make all necessary orders to carry into effect any decree previously rendered, including the issuance of necessary writs therefor, to order the issuance of writs of *certiorari*, to permit amendments in any process, pleading, or proceeding in law or equity. Any order so made shall be signed by the judge making it, and filed and entered of record by the clerk of the court in which the proceeding is had, and from the date of such filing shall have like force and effect as if made at a regular term of such court. The pendency of a term of court in another county than that in which the suit is pending, or about to be commenced by the same judge, shall

not prevent the granting of such order. L. 1871–2, p. 504, secs. 1, 2."

The succeeding section (sec. 50) provides that "no such order shall be granted in vacation, unless the party applying therefor shall give the opposite party, or his attorney of record, reasonable notice of his intended application."

We are of opinion that the authority of a judge in vacation to appoint a receiver of a railroad corporation cannot be derived from the foregoing section. This precise question has not, that we are aware, been determined in the Supreme Court of Illinois. But what fell from that learned tribunal in the cases already cited leads us to believe that when the question is directly presented for determination it will rule in accordance with the view we have just expressed.

In the argument before us attention was called to the fact that between the words, in section 49, "to hear and determine motions" and the words "to dissolve injunctions," there appears a comma; and that was, to some extent, relied on as showing that a judge in vacation could hear and determine motions of every kind, not simply those relating to matters specially defined in that section. While the comma after the word "motions," if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute. Lord Kenyon, Ch. J., in Doe *v.* Martin, 4 T. R., 65, said that courts in construing acts of Parliament or deeds should read them with such stops as will give effect to the whole. (Sedgwick's Constr. Stat. and Const. Law, 2d ed., 223, note *a*; Bouvier's Law Dic., 347, 402.) The general rule is well illustrated in Barrington's Statutes, 4th ed., 438, note *x*; Price *v.* Price, 10 Ohio St., 316; Cushing, &c., *v.* Worrick, 9 Gray, 385; Geiger's estate, 65 Penn. St., 311; and Hamilton *v.* Str. R. B. Hamilton, 16 Ohio St., N. S., 432. In the last case it was said: "But for the punctuation as it stands there could be little doubt but that this was the meaning of the Legislature. Courts will, however, in the

construction of statutes, for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." Apart from the general rule upon this subject, there are reasons why the punctuation of section 49 should not control its interpretation. It will be observed that at the close of that section is a reference to the laws of Illinois passed at the session of 1871–2 of the General Assembly, indicating that section 49 was, in part at least, founded upon an existing or previous statute. One of the rules prescribed by the revision of 1874 for the construction of statutes is that "the provisions of any statute, so far as they are the same as those of any previous statute, shall be construed as a continuation of such prior provisions, and not as a new enactment." (Rev. Stat. Ills. 1874, p. 1012, section 2.) Turning then to the previous law—the act of March 7, 1872—we find no comma after the word "motions," but the statute reads, "to hear and determine motions to dissolve injunctions," &c. (Sess. Laws Ills. 1871–2, p. 504.) We are not prepared to hold that the power of a judge in vacation to exercise the important judicial function of appointing a receiver of a corporation, charged with public functions, was conferred by the introduction of a comma into the revised statutes of a State, where the established doctrine is that no judicial functions can be exercised by a judge in vacation, except where expressly or specially authorized by statute.

But if, as the argument of counsel would imply, a judge in vacation may, by virtue of the powers conferred by section 49, hear and determine every matter presented by way of motion, and not simply motions relating to the dissolution of injunctions, to staying or quashing executions, to orders carrying into effect decrees previously rendered, to writs of *certiorari*, or amendments in process, pleading, or proceedings in law and in equity—which are the subjects specifically referred to in that section—we are satisfied that an application to dispossess those in control of a railroad corporation, whose

road is declared by the Constitution of the State to be a public highway, and to place its entire property in the hands of a receiver, is not, within the meaning of the statute, a motion which may be heard and determined by the judge out of term time. It is rather a proceeding involving the exercise of the highest discretion and embracing a very wide field of judicial investigation and inquiry. The injustice which may result from the exercise of such a power in vacation is well illustrated in this case by the fact that, while the judge of the State court did not doubt his power, out of term time, to oust those in the control of a public corporation and appoint a receiver with authority to carry on the business of a carrier of freight and passengers, he could not, under his view of the statute, determine in vacation an ordinary motion to become a party to the suit, made by the trustee in a first mortgage or deed of trust covering the entire property and franchises in question.

It results from what has been said that the seizure of the property by the receiver of the Federal court was not an interference with the possession of the State court, or in derogation of its authority. The property was not, in any legal sense, then in the custody of the State court, or of any officer by it appointed. It was, when seized by order of the Federal court, in the custody of one who assumed, without lawful authority, to represent the State court, but who in fact proceeded under a void order of a judge in vacation.

The Circuit Court of the United States having thus lawfully acquired possession of the property, prior to any action in reference to it by the State court, the former had the right to retain possession for all the purposes of the suit for foreclosure of the mortgage of the 12th of April, 1871. Under the final decree of foreclosure it was, as we have seen, sold in satisfaction of the mortgage debt, leaving nothing to be applied on the claims of Hammock and other judgment creditors.

We proceed now to inquire whether, in the orders or decrees under which the property has been disposed of, any error has been committed to the prejudice of the substantial

rights of appellants. On their behalf it is suggested that the decree was erroneous in that it required the sale of the real estate covered by the mortgage to be made absolutely and without the right of redemption allowed by the local statutes in decretal sales of mortgaged lands. The question is one of great importance, and has received, upon our part, all the consideration its importance demands.

By the statutes of Illinois in force when the mortgage was made, real estate taken in execution, if susceptible of division, is required to be sold in such quantities as may be necessary to satisfy the execution and costs. (Rev. Stat. Ill. 1869, Gross's ed., p. 397, sec. 11.) And it is made the duty of the sheriff, or other officer, selling lands or tenements by virtue of an execution, to give to the purchaser, or purchasers, a certificate in writing describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when, if the property be not redeemed, the purchaser will be entitled to a deed. (Id., p. 380, sec. 15.)

It is further provided that the defendant, his heirs, executors, administrators, or grantees, might, within twelve months from the sale of his lands or tenements under execution, redeem the same by paying to the officer who sold it, for the benefit of the purchaser, the sum of money which may have been paid on the purchase, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of ten per centum from the time of sale. (Id., section 16.) The right was given to any judgment creditor, after the expiration of twelve and within fifteen months from the sale, to redeem the property by paying the amount paid by the purchaser,—such payment entitling him to have a re-sale under the execution upon his own judgment. (Id., secs. 17 and 18.) This right given to judgment creditors could be exercised as to the whole or any part of the lands or tenements sold, provided the redemption is made

in the like distinct quantities or parcels in which the same are sold. (Id., sec. 19.)

If the lands or tenements so sold are not redeemed by the defendant, or by a judgment creditor, within fifteen months from the sale, it is the duty of the officer making it to execute a deed to the purchaser. (Id., sec. 25.)

The provision in reference to redemption from mortgage sales is, that "where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators, or grantees, to redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree in the same manner as is prescribed for the redemption of lands in like manner sold upon executions upon judgments issued at common law." (Id., p. 382, sec. 27.)

The history of the right of redemption, as given by the laws of Illinois, may be traced in Statutes of 1825, page 151; Revised Statutes of 1829, page 85; Id. 1833, page 374; Id. 1845, page 302. When originally conferred as to sales of land under execution, there were no railroads in that State, and very few, if any, when it was first (in 1845) extended to decretal sales of mortgaged lands.

In Brine *v.* Insurance Company, 96 U. S., 627, we held that the right of redemption given by the Illinois statutes constituted a rule of property which the Federal court sitting in equity, in that State, is bound to recognize and enforce. The property there in controversy was a lot of ground in the city of Chicago owned by a private person, and which had been conveyed in trust to secure a loan of money by an insurance company.

When the mortgage by the Chester and Tamaroa Coal and Railroad Company was made, there was in force a general statute, passed in 1855, conferring upon any railroad company organized or incorporated under the laws of Illinois the power

to mortgage all or any portion of its property and franchises to secure the payment of money borrowed to aid in the construction, completion, or operation of its road. (Gross's ed., p. 553; Laws of Illinois 1855, p. 304.)

And by the State Constitution adopted in 1870, railroads thereafter constructed were declared to be public highways, free to all for the transportation of their persons and property thereon, under such regulations as should be prescribed by law. (Art. 11, sec. 12.)

The question is therefore presented for the first time in this court, whether the statutory provisions giving the right to redeem as well lands or tenements sold under execution as mortgaged lands sold under decrees of courts of equity, has any application to the real estate of a railroad corporation which, with its franchises and personal property, is mortgaged, as an entirety, to secure the payment of money borrowed for railroad purposes.

Undoubtedly in all such cases the chief value of the real estate comes from the right or franchise to hold and use it, in connection with the personal property of the corporation, for railroad purposes. It is equally true, not only that the bonds to secure which the mortgage is given could not be negotiated in the markets of the country did not the mortgage embrace as an entirety the franchises and all the real and personal property of the corporation used for railroad purposes, but that a sale of the real estate, franchises, and personal property separately might, in every case, prove disastrous to all concerned, and defeat the ends for which the corporation was created, with authority to establish and maintain a public highway.

It is, nevertheless, contended by counsel that as the statute attaches to decretal sales of mortgaged lands the right of redemption, that right exists as well in cases of mortgages covering the entire property and franchises of a railroad corporation as where the land is owned and used by private persons for exclusively private purposes.

In other words—for to that result the argument would lead

—the court, in decreeing the sale of the mortgaged property and franchises of a railroad corporation, has no discretion, if the corporation or its judgment creditors so demand, except to order the sale of the real estate separately, in parcels, when susceptible of division, and subject to redemption, leaving the franchises and personal property to be sold absolutely and without redemption. Thus one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property. If the railroad company should redeem the real estate, it could not employ it to any valuable end; for its franchise to be a corporation and to use its real estate for railroad purposes will have been sold to another, and there is no right under the statute to redeem the franchise, it not being real estate, but rather a power or privilége, partaking more or less of sovereignty, and which may not be exercised without a special grant. (1 Redfield on Law of Railways, 94.) Consequences equally injurious would flow even from the sale as an entirety of the real and personal property and franchises of the corporation, if the right was reserved to the company, or its creditors, to redeem the realty. Individuals or associations desiring railroad property would not purchase when they could not know, until the expiration of fifteen months from the confirmation of the sale, whether they were to have all for which they might bid. During that period of uncertainty the property would necessarily depreciate in value for the want of repairs and betterments essential to its preservation. A construction of the statute which leads to such results ought not to be adopted if it can be avoided; and we think it can be, without contravening the spirit of the statute or the public policy which suggested its enactment.

We are of opinion that mortgaged real estate, to which is attached the right of redemption, is such, and such only, as could at law be levied upon and sold on execution. The right does not extend to real estate of a public corporation mortgaged with its franchise to acquire, hold, and use property for public purposes, and whose chief value depends upon its being so used

and appropriated. The difference between real estate so acquired, held, and used, and real estate which may, at law, be sold under execution, is well illustrated in Gue *v.* Tide Water Canal Company, 24 How., 262. In that case it appeared that an execution was levied upon a house and lot, sundry canal locks, a wharf-boat, and several lots, the property of the canal company, chartered under the laws of Maryland for the construction of a canal from Havre de Grace, in that State, to the Pennsylvania line. The property so levied upon was admitted to be necessary to the uses and working of the canal, which was a public improvement and a great thoroughfare of trade. It was of little value apart from the franchise to take tolls, and if sold separately under execution, the franchise to take tolls, said Chief Justice Taney, speaking for the court, would not have passed to the purchaser. It was consequently ruled that the real estate there in controversy could not be seized and sold under *fieri facias*, and, consistently with the rights of stockholders and creditors, could not be sold separately from the franchise, from which was derived its chief value.

The laws of the State of Illinois having permitted the Chester and Tamaroa Coal and Railroad Company to mortgage its franchises and property as an entirety, it was, we think, the duty of the court to decree the sale, as an entirety, of the whole property so mortgaged, without reference to the local statutes upon the subject of redemption. Real estate thus mortgaged with the franchises of the company is of necessity relieved from the operation of that statute. There may possibly be cases in which real estate of an ordinary kind, owned and mortgaged by a railroad corporation, cannot be sold by decree of court except subject to the right of redemption; as, when it is not used for necessary railroad purposes, or when it is mortgaged separately from its franchises and other property. What may be the operation of the statute in such cases we do not now decide. All that we do decide is that, by the laws of Illinois, the real estate, franchises, and other property of a railroad corporation, mortgaged as an entirety, may be sold as

an entirety under the decree of a court of equity, without any right of redemption in the mortgagor, or in judgment creditors, as to such real estate.

The construction we have given to the statute is not inconsistent with the provision of the State Constitution which declares that "the rolling stock and all other movable property belonging to any railroad company or corporation in Illinois shall be considered personal property, and shall be liable to execution and sale in the same manner as personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale." (Article 11, section 10.)

When the mortgage of April 12, 1871, was executed, there was no levy upon the movable property of the company, and consequently the rights of the mortgagee were superior to any lien arising from any subsequent levy by execution upon the movable property. The State Constitution did not forbid the creation by mortgage of such superior lien.

So far from that section militating against the construction we have given the statute, it rather fortifies it. It furnishes a strong implication that the right to levy an execution upon the movable property of a railroad corporation was intended to be restricted to that kind of corporate property. It is a partial modification of the general rule that the property of a railroad corporation, used for necessary railroad purposes, cannot be seized and sold under an execution at law.

The next question to be considered is that which relates to the distribution of the proceeds of the sale of the mortgaged property. The argument upon this branch of the case, in behalf of the appellants, briefly stated, is this: That by the laws of the State in force when the mortgage of April 12, 1871, was executed, a mortgage of personal property, certified by a justice of the peace in the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where the mortgagor resides, shall, "if *bona fide*, be good and valid from the time it is so recorded, for a space of

not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor, provided that such conveyance shall provide for the possession of the property so to remain with the mortgagor;" (Gross's ed. 1869, p. 67;) that more than two years having expired, after the execution of the mortgage of April 12, 1871, and before the suit for foreclosure, (the property mortgaged remaining in the possession of the railroad company until seized in Hammock's suit,) the judgment creditors, by virtue of their suit in the State court, acquired a lien, at least upon the rolling stock and other movable property covered by the mortgage, superior to any claim on the part of the mortgagee and those it represented; and that since the personal property was surrendered and the proceeds of its sale applied in discharge of taxes upon the real and personal property and capital stock of the corporation, the court, upon principles of equity, should have appropriated to the judgment creditors so much of the proceeds of the decretal sale as was equal to the taxes on real estate paid from the proceeds of the sale of personal property by the collectors.

We are of opinion that the statutory provisions in regard to chattel mortgages (Gross's ed., p. 66) do not embrace mortgages by a railroad corporation, in connection with its real estate and franchises, of its personal property used and appropriated for railroad purposes. The statute provides a mode by which possession of the mortgagor of personal property should not defeat the mortgage, viz., the acknowledgment and record of the mortgage. The acknowledgment is required to be made before a justice of the justice's district in which the mortgagor resides, and recorded in the recorder's office of the county where he resides. These directions are wholly inapplicable to a railroad company whose line of road might pass through several justices' districts and extend through several counties. And if the construction contended for be sound, a railway mortgage security, so far as the personalty of the corporation is concerned, would cease to be of any value after the

expiration of two years from its execution, unless the mortgagor, before the expiration of that time, takes possession of it—the authority to do which in advance of the maturity of the mortgage debt, and when there has been no default of the corporation in meeting its interest, would render the negotiation of the mortgage bonds difficult, if not impossible. Clearly the chattel-mortgage statute has nothing to do with the present case.

What we have said renders it unnecessary to consider the other branches of the proposition last stated, and disposes of all questions of importance, upon the merits, arising on the appeal from the final decree ordering a sale of the mortgaged property, and directing a disposition of the proceeds arising therefrom.

We have seen that the Farmers' Loan and Trust Company, in vacation, filed in the clerk's office of the State court a petition to be made a party to the creditor's suit of Hammock, with an answer and cross-bill, and also a petition for the removal of that suit into the Federal court, accompanied by the required bond; and that the judge of the State court, in vacation, declined to act upon the petition to be made a party, or to recognize the right of removal. Whether the cause was, under these circumstances, properly docketed in the court below as one legally removed under the act of Congress, or whether the Federal court exceeded its authority in the final order of injunction, made on the 17th day of January, 1879, upon the petition of the Wabash, Chester and Western Railroad Company, are questions about which there is a difference of views among those members of the court who heard the cause and participated in its decision. We therefore forbear to make any expression of opinion upon them. And it is not at all important to the parties that we should do so. The object of the suit in the State court was to reach the property of the railroad company, and from it, or from the income to be derived therefrom, obtain satisfaction of the judgments against the corporation. Whether that suit was or not, under the act

of Congress, legally removed into the Federal court, the entire property, we have seen, passed lawfully into the custody of the latter court, and by proceedings therein, to which the judgment creditors were parties, and by which they are concluded, it has been all sold, and the proceeds adjudged to be rightfully distributed in satisfaction of the mortgage debt. It would, consequently, serve no valuable purpose for the appellants, were it now decided that the suit commenced in the State court was not legally removed into the Federal court, or that the order of January 17, 1879, was beyond the power of that court to make.

The decrees appealed from are therefore affirmed.

AFFIRMED.

AUSTIN CORBIN v. THE COUNTY OF BLACK HAWK AND OTHERS.

April 24, 1882.

1. Where the officer of a county enters into contracts to sell different pieces of land of the county to different parties, who subsequently, on the failure of the county authorities to comply with the contract, all sell their interests to one party, and he tenders the amount necessary to entitle him to enforce such contracts, the matter in dispute, as regards his right to appeal, is the amount so tendered, even though his separate vendors would not have had the right of appeal; and the county and its officers are real parties in interest in such a suit, although it was the duty of the governor of the State to issue the patent.
2. The contents of a contract, in the sense of section 629 of the Revised Statutes of the United States, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents.
3. Hence, where a county commissioner sells different pieces of land to different parties, who sell and convey their interests to one party, and he tenders the amount necessary for the enforcement of the contracts, the Federal Circuit Court has no jurisdiction of a suit brought by him to enforce such contracts, unless his assignors might also have sued in it.

APPEAL from the Circuit Court of the United States for the District of Iowa.

J. D. Campbell, for appellant.

Galusha Parsons, for appellees.

BLATCHFORD, J.—This case comes into this court on an appeal by the plaintiff below from a decree dismissing the amended and substituted bill of complaint, on demurrers thereto for want of jurisdiction. The defendants are the county of Black Hawk, in the State of Iowa, the auditor and the treasurer of that county, and thirty other individuals. The original bill was filed in November, 1874. The citizenship of the plaintiff as a citizen of New York, and that of all the defendants as citizens of Iowa, is properly alleged. The bill avers that in 1857 one John Kerr, as school commissioner of said county, being thereunto duly authorized by the laws of Iowa, made eleven several contracts in writing in respect to the sale of land, four with one person, and one with each of seven other persons. A copy of one of the contracts is made part of the bill, each of them being averred to be in like words and figures, except the name of the purchaser, the description of the land, and the amounts of money mentioned. Such copy is in these words:

"SCHOOL-FUND COMMISSIONER'S OFFICE,
"BLACK HAWK COUNTY, *July* 10, 1857.

"Contract made and entered into between John Kerr, as school-fund commissioner for the county of Black Hawk, Iowa, and Abraham Carey, of the county of Black Hawk and State of Iowa, to wit:

"The said John Kerr, school-fund commissioner, as authorized by law, has bargained and sold, and by these presents does bargain and sell, to the said Abraham Carey the following described tract or parcel of land, being a portion of section number sixteen, (or lands in lieu thereof,) granted to the State for the use of schools by an act of Congress entitled 'An act supplemental to the act for the admission of the States of Iowa and Florida into the Union,' approved March 3, 1845,

to wit: Lot No. 10, being the west (½) half of the southeast (¼) quarter section sixteen (16), township eighty-nine (89) north, of range fourteen (14) west, containing eighty acres.

"The price agreed upon is nine and $\frac{5}{100}$ dollars per acre, amounting to the sum of seven hundred and twenty-four dollars, the one-fourth part of which, to wit, one hundred and eighty-one dollars, has been paid in cash to the said school-fund commissioner, and the balance, to wit, five hundred and forty-three dollars, secured by a promissory note bearing even date herewith and payable on or before ten years from date, bearing interest at the rate of ten per centum per annum, payable annually, on the 1st day of January, at the office of the said school-fund commissioner in Black Hawk county.

"Now, if the said Abraham Carey, his heirs, executors, or administrators, shall pay or cause to be paid the interest on said note as the same falls due, together with the principal within the time specified, then he will be entitled to receive from the governor of the State of Iowa a patent for the land herein described. In case of failure to make any of the payments aforesaid punctually as stipulated, all previous payments shall be considered forfeited, and the land subject to be sold by the school-fund commissioner, or the payment of the money enforced according to law, at the option of said commissioner.

"In testimony whereof the parties have hereunto set their hands and seals the day and year first above written.

"(Signed) JOHN KERR, [L. S.]

"*School-Fund Commissioner of Black Hawk county.*

"In presence of— "ABRAHAM CAREY.

"D. J. COLEMAN."

The bill alleges that the cash payment specified in each contract was made; that the promissory note specified in each contract was made and delivered; that a record of each sale was duly made as provided by law; that each of the several persons to whom the lands were sold "made divers payments of money upon their several notes," which payments were credited upon the notes by the proper officers of the county,

but the plaintiff cannot set forth particularly the dates and amounts of the payments; that the notes and the amounts due thereon are held by the county as valid claims against their makers; that by the said premises the several purchasers became the owners of the several tracts of land; that the legal title to the lands remained vested in the county; that on the payment of the balance of said moneys the county was bound to cause the lands to be conveyed to the several purchasers, or their assigns; that afterwards the several purchasers, for money considerations, respectively made and delivered to the plaintiff certain "conveyances," a copy of one of which is made part of the bill, each of the others being averred to be in like substance and effect, except the name of the grantor and the description of the lands conveyed; that the "conveyances" were duly filed in the office of the auditor of the county; and that thereby the plaintiff became the owner of the several contracts and the several tracts of land. Such copy is in these words:

"Know all men by these presents, that I, Wm. H. McClure, in consideration of the sum of one hundred dollars in hand paid to me by Austin Corbin, of Kings county, State of New York, the receipt whereof is hereby acknowledged, do hereby sell and convey to the said Austin Corbin all the interest in the following described land, viz.: Lots numbers three (3), eleven (11), and twelve (12), being the north half of the northeast quarter and the east half of the southeast quarter of section sixteen (16), township eighty-nine (89) north, of range number fourteen (14) west of the fifth principal meridian, in Black Hawk county, Iowa, which was conveyed to me by a contract, now on file in the office of the county auditor of Black Hawk county, Iowa, made by and between John Kerr, school-fund commissioner of said county, and Wm. H. McClure, for the conveyance of said lands; and I hereby sell and assign to said Corbin all my rights under said contract, covenanting with him that I have not sold, assigned, or transferred the same to any person or persons.

"In witness whereof I have hereunto set my hand this 1st day of July, 1871.

"In presence of— "WM. H. MCCLURE.

"DAN'L W. FOOTE.

"Indorsed on back as follows:

"This assignment filed in my office this 1st day of July, A. D. 1871. "D. W. FOOTE, *Auditor*."

The bill further alleges the willingness of the plaintiff to pay to the county the amount remaining unpaid on the notes, being the balance of the purchase-money of the several tracts of land; that in January, 1872, he offered to pay it to the auditor of the county; that in October, 1874, he tendered to the auditor and to the treasurer $16,197.69, as and for the payment of the balance remaining unpaid on the purchase-money of the several tracts of land, and all interest thereon; that said sum was more than sufficient to pay said balance; that said officers failed to accept the money so tendered, and refused to state whether they accepted or refused to accept it; that the plaintiff then and there became entitled to demand the issuance of certificates of the payment of the moneys provided to be paid in said several contracts, and then and there did demand the issuance of the same, which was refused; that the plaintiff brings into court for the use of the defendants the amount so tendered, to wit, $16,197.69, for the purpose of completing and perfecting the said tender, and to enable the defendants to accept the same, if they elect so to do, at any time; that in case said moneys should be found insufficient in amount for said purposes, the plaintiff offers to pay and bring into court such further sum as may be found to be necessary; that the said several contracts are valid and subsisting; that the said county has never undertaken to rescind them, or given notice of an intention to do so, or commenced suit to enforce payment of the purchase-money, or to foreclose the equities of the plaintiff or of his grantors; that no forfeiture of said contracts could lawfully be made by said county; that the defendants other than the county and its said two officers sever-

ally claim to have some title to or interest in said lands, or some part thereof; that pursuant to said last mentioned sales of said land, patents have been issued for said lands, or some of them, to said defendants, or some of them, by the governor of the State of Iowa, but the plaintiff cannot more particularly state the facts in respect to the issuance of said patents; that the plaintiff is the lawful owner of said several tracts of land, and that the issuance of said patents has vested the legal title to said premises in the patentees therein named. The prayer of the bill is that the said subsequent sales of the said several tracts of land, and the said patents, and all conveyances of said lands by said patentees, be decreed to be void and of no effect as against the estate of the plaintiff; that the title of the plaintiff to said premises be forever quieted as against said defendants claiming any interest in said lands; that each of them be enjoined from setting up any interest in said premises under said sales and the patents issued thereunder; that the said patentees and their several grantees be decreed to hold the legal title to said lands as the trustees of and for the plaintiff, and that they be compelled to convey the same to the plaintiff upon such terms as to the court may seem just and equitable. Three separate demurrers were filed to the amended bill, one by the county of Black Hawk, one by its auditor and its treasurer, and one by the remaining defendants. In each of the demurrers one of the causes of demurrer assigned is, that it does not appear upon the bill that the Circuit Court has jurisdiction of the alleged causes of action or of the parties, or that the plaintiff's several assignors could have maintained actions in the Circuit Court against the demurring defendants upon the said several contracts. The decree of the Circuit Court states that it declined to hear argument upon any of the questions raised by the demurrers except the question of jurisdiction, that it had heard arguments as to that question, and that the ground of the dismissal of the amended bill is, that the court has no jurisdiction of the cause.

Opinion of the court.

The first point taken by the appellees is that the appeal ought to be dismissed for want of jurisdiction in this court, on the ground that the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs. The view urged is that the interest of each of the appellees who is alleged to have an interest in some of the lands in question is several; that each several interest is not shown to exceed the value of $5,000; and that the county of Black Hawk and its officers are not necessary or more than formal parties to the suit. But the allegations of the bill, which must be taken as true for the purposes of this case, are, that although, under the contracts, the patents for the lands are to be issued by the governor of the State, the notes and the amounts due thereon are held by the county, the money is to be paid to the county, and the tender was made to the officers of the county who are defendants. The matter in dispute between the appellant and the county is the sum of $16,197.69, which he tendered to its officers and which they did not accept. Under the contracts the purchaser is entitled to receive a patent from the governor only on paying the notes, which are alleged to be held by the county. To obtain the relief asked for in the bill the plaintiff must first pay the said sum to the county in discharge of said notes. His title cannot be quieted as prayed for, as against the adverse claimants of the lands, until his contract obligations to the county are fulfilled. Therefore the county and its said officers are real parties to the suit, and the matter in dispute as to them is the sum so tendered.

Although the amended bill in the record was filed in July, 1878, the counsel for the respective parties have stipulated in this court, in open court, that the suit in the Circuit Court was originally begun in November, 1874. The question of the jurisdiction of the Circuit Court is, therefore, to be determined under that clause of section 629 of the Revised Statutes which provides that "no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might

have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." There can be no doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands in question. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon, which are sought to be enforced in this suit. The only question for consideration is whether the suit is one to recover the contents of the contracts.

The appellant contends that the suit is not one to recover the contents of a chose in action; that it is not even founded upon the contracts; and that it is only a suit to determine the validity, force, and effect of certain transactions which occurred subsequently to the making of the contracts, whereby certain rights are claimed to have arisen adverse to those existing under the contracts. It is urged that the appellant does not prosecute the suit in his character of assignee, but prosecutes it because a cause of action has accrued to him through the act of the county officers in refusing to accept the tender, and through the assertion by the other individual defendants of an adverse title to the lands. But we cannot take this view of the case. The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are

made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise. The promise to receive the money stipulated in these contracts to be paid by the purchasers, as a foundation for their right to receive patents, is, so far as this suit is concerned, the essence of the contracts; and a suit to compel the acceptance of that money is a suit to enforce such promise, and, therefore, is a suit to recover the contents of the contracts. This principle was settled in the early case of Serè v. Pitot, 6 Cranch, 332, under section 11 of the judiciary act of 1789, which is re-enacted in section 629 of the Revised Statutes. There the plaintiffs were the general assignees of the effects of an insolvent debtor by operation of law. It was contended that the statute applied only to a voluntary assignment of a particular chose in action, and that the word "contents" did not apply to accounts or unliquidated claims, but was confined to transferable paper. But the court held that the statute intended to except suits in virtue of equitable assignments as well as suits in virtue of legal assignments, and to exclude from the Federal courts the assignee of all the open accounts of a merchant as well as the same person when the assignee of a particular note. The court say: "The term 'other chose in action' is broad enough to comprehend either case, and the word 'contents' is too ambiguous in its import to restrain that general term. The 'contents' of a note are the sum it shows to be due, and the same may, without much violence to language, be said of an account." Following out this principle, the obligation or the promise contained in a contract is its contents, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents.

In Deshler v. Dodge, 16 How., 622, 631, it is said by the court that the statute in question applies to cases "in which the suit

is brought to recover the contents or to enforce the contract contained in the instrument assigned;" and that where the suit is brought to enforce the contract contained in the chose of action, the assignee is disabled, unless the suit might have been brought in the court if no assignment had been made. Again, in Bushnell *v.* Kennedy, 9 Wall., 387, it is suggested by the court that the restriction applies to rights of action founded on contracts which contain within themselves some promise or duty to be performed, and that such contracts may be properly said to have contents.

The amended bill in this case contains no averment showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made; and it is well settled that this is necessary. (Turner *v.* Bank of North America, 4 Dallas, 8; Mollan *v.* Torrance, 9 Wheaton, 537; Bank of United States *v.* Moss, 6 How., 31; Bradley *v.* Rhines's Admrs., 8 Wall., 393.)

We are, therefore, of opinion that the Circuit Court had no jurisdiction of this suit, and that its decree must be affirmed, with the modification that the dismissal of the bill is without prejudice to the right of the plaintiff to bring any suit he may be advised in the proper court.

AFFIRMED.

JAMES S. MARSH AND E. C. MARSH v. JOHN MCPHERSON.

April 24, 1882.

1. A recital in a contract of sale or exchange that the vendor "hereby delivers possession" of the articles sold vests the title and right of possession in the vendee, but is not of itself a delivery of actual possession.
2. If the vendee, even after suit brought by him, accepted the articles sold after the time when they should have been delivered, or permitted repairs or supplies to be furnished, and accepted the benefit of them, such fact may be proved in reduction of damages for the breach of contract.

Opinion of the court.

3. In case of a total failure of the vendor to comply with a contract of sale, or a partial failure arising from his supplying defective articles, the measure of damages, unless in exceptional cases of special damage, is what it would cost the vendee to supply the deficiency, without regard to the contract price.

ERROR to the Circuit Court of the United States for the District of Nebraska.

J. H. Broady, for plaintiffs in error.

John L. Webster, for defendant in error.

MATTHEWS, J.—This action was brought January 15, 1878, by the defendant in error against the plaintiffs in error, to recover damages for the breach of a contract under seal for the sale of certain real and personal property. On October 16, 1877, the parties entered into a written agreement, by which McPherson agreed, in consideration of the covenants of the parties of the second part, to sell and convey to them certain described real estate in Nebraska and, in addition thereto, one-half the stock of goods in a store belonging to him, on a parcel of the real estate. The plaintiffs in error, parties of the second part, covenanted on their part to pay for the said real estate as follows: for one parcel, $18,190.37, in combined reapers and mowers and self-rakers, known as the Valley Chief, to be taken, those designated as No. 1 at $175 each, and No. 2 at $170 each, to be delivered, eighty-six machines of No. 1 and twenty of No. 2, at certain named points in different parts of the State, and in Kansas, "all the said machines to be delivered in good condition and free of all incumbrances, of taxes, and of charges for freight, each machine to have two smooth sickles and one sickle-edge sickle." In the agreement the freight on each machine from the manufactory at Lewisburg, Pennsylvania, was estimated at twenty-five dollars, and in all cases, when it fell below that sum, the difference was to be accounted for and paid. The store property was to be paid for in cash and notes, and the remainder of the real estate, at

$3,600, in machines of another description at $175 each, "to be delivered in good condition, free of incumbrances," as before in respect to the others, at certain other named places, being eleven machines at Beatrice, Nebraska, and the remainder of this lot on board cars at the factory at Lewisburg, consigned to the party of the first part, or to his order.

At the time of the execution of this agreement, the machines, it is alleged, were in the possession of the agents of the party of the second part at the various points, and that they were not in good condition, were subject to incumbrances and charges, and that the defendants failed and refused to deliver them, although the party of the first part had fully performed his covenants, by conveying the real estate and delivering the goods as required by the contract. It is averred in the petition that the machines, in the condition required by the contract, were worth the amount of the agreed value of $21,775, to recover which, with an additional sum for an ascertained difference of freight, the suit is brought. It was begun in the State court, and the defendants below having appeared to the action, being citizens of Pennsylvania, and the plaintiff a citizen of Nebraska, the cause was removed for trial into the Circuit Court.

The defendants in their answer admitted the execution of the agreement set out in the petition, but alleged that it was fully executed, fulfilled, and superseded by a subsequent agreement in writing between the parties, indorsed on it, and dated November 5, 1877, in the words following, to wit:

"BROWNVILLE, NEBRASKA, *November* 5, 1877.

"The above contract is this day executed by the said parties thereto as follows: The within-named real estate is conveyed by said first party (McPherson) to said second parties (Marsh and Marsh); also one-half of said stock of goods at an invoice in the sum of four thousand and two hundred and forty-three and $\frac{10}{100}$ dollars, making price of the half four thousand two hundred and forty-three and $\frac{10}{100}$ ($4,243.10) dollars, is delivered by McPherson to said parties, Marsh and Marsh.

"The said second parties, Marsh and Marsh, hereby acknowl-

edge payment of all said machines named in the list within named, aggregating eighty-six number ones, twenty number twos, and hereby deliver all thereof to said first party at the places named in said within list, (except there is two instead of one at Donnebrag, and three instead of four at Wahoo, which change is consented to by the parties,) free and clear of all liens, charges, or taxes, up to and including taxes for the year 1878, as per within contract. Said second parties also hereby deliver to said first party eleven of said machines within named, called Marsh number four, as provided for within and on the within-named terms therefor, at Beatrice. On this eleven machines number four there is two hundred and seventy-five dollars freight in favor of said second parties, to whom said first party shall account therefor as hereinafter stated.

"The balance of $259.63 on the said list of number ones and number twos, and the said eleven number fours, amounting to $1,925, is applied on the purchase-price of said lands in Sonora Island, leaving balance of $1,415.37, for which said second parties shall deliver, as provided for within, eight of said machines number four on board the cars in Pennsylvania at place within named, leaving still a balance on said purchase-price of island real estate of $15.37 in favor of said first party, to whom the second parties shall account. As soon as the amounts due said first party on freights of said number ones and twos are ascertained, the same, with the said $275 due second parties and said $15.37 due said first party, shall be settled and adjusted by the parties. Said eight number fours to be delivered within thirty days after notice to second parties. Said second parties hereby warrant that said eighty-six number ones and twenty number twos and eleven number fours are now at the places above named in condition for delivery as above and within provided for, and that said eight number fours shall be delivered as above stated, and shall stand good to said first party for any breaches or failures of such warranty and promise.

"On said store goods one thousand dollars is paid to said first party, the receipt of which is hereby acknowledged, and the balance shall be paid according to the within contract.

"JOHN MCPHERSON.
"JAMES S. MARSH.
"E. C. MARSH."

On the said contract the following agreement was indorsed by plaintiff, to wit:

"Received of said second parties, Marsh and Marsh, in full payment and settlement of said balance due for said store goods after said payment of one thousand dollars, the following described notes of this date, made by James S. Marsh to my order, to wit: one for $1,056.44, one for $915.72, one for $685.47, and one for $585.47—in all, four several promissory notes for said amounts, all due December 1, 1877, with interest at ten per cent. per annum after maturity.

"November 7, 1877..

"(Signed,) JOHN MCPHERSON.

"Witness: WILLIAM H. HOOVER."

The defendants also alleged performance of the contract and aver "that the said transactions between plaintiff and defendants were neither sales of the said plaintiff's lands and goods nor sales of defendants' machines, but were barters of the property of one in exchange for the property of the others, in which the prices fixed were largely in excess of cash prices; so much so that neither would have bought the property of the other for cash at such prices, and that the naming of the prices in the transaction was nothing more than a matter of convenience in executing the exchange."

The defendants further aver as to the eight Marsh number 4 reapers to be delivered on board cars at Lewisburg, Pennsylvania, three had been delivered, and that as to the remainder they have been ready and willing to do so on the order of the plaintiff, but that he has neglected to do so, but that they hold the same for him. The answer also contains the following:

"Defendants admit that after the making of said agreement in November, 1877, defendants told plaintiff that they (the defendants) would visit each of the points named in said writing where said machines then were, and at which places they were delivered as stated in said writing, and if any agents were not settled with, or any liens or charges were claimed against any of said machines, would make settlement with their said agents then and theretofore having charge of said agricultural machines, and would pay off and discharge all unpaid claims and liens of any *of every* kind and sort upon each and all of said machines, and put in good repair each and all of the said machines, so as to have the same conform to the conditions of said machines; so as to have the same conform to the conditions of said agreement and warranty in writing; but deny that they ever so stated until after said writing of November, 1877, or that they told plaintiff that they would do so at once, but aver that they stated that they would do so in a reasonable time to have them so repaired and in good condition for the first season and time for selling reapers and mowers, which season, defendants aver, was the latter part of the spring of 1878, continuing from thence through the summer of 1878, and aver that said promise was to so repair and fit up said reapers and mowers ready for the harvest of small grains in the year 1878, and for the sales for such harvest, which time commenced about May, 1878, and continued during such harvest; all of which was agreed to between the parties hereto as satisfactory, as making good the warranty of defendants in said agreement dated November 5, 1877, all of which said promises these defendants have fully performed and complied with, and have previous to said time and previous to the commencement of the reaper and mower trade for 1878, and previous to April, 1878, visited each of the points named in said writing dated October 6, 1877, where said machines then were, and made settlements with their agents then and there having charge of said agricultural machines, where settlements had not already and heretofore been made

with such agents, and paid off and discharged all claims and liens of every kind and sort upon each and all of said machines, and put in good condition and repair each and all of said machines, wherever any such claims or liens were unpaid and wherever any of said machines were not in good condition or were out of repair, and had all said machines as aforesaid discharged of all claims and liens of any and every sort, and in good repair and condition for the 1878 market, in due time for such market and pursuant to such promise."

The cause was tried by jury, and there was a verdict and judgment for the plaintiff, to reverse which this writ of error is prosecuted.

There are thirty-three assignments of error, based on exceptions to the rulings of the court upon questions of evidence and upon instructions to the jury, either given, or asked and refused; but it will not be necessary to refer to them in detail.

The chief issues between the parties, raised by the pleadings and maintained in evidence, were whether there had been a delivery of possession by Marsh & Marsh to McPherson of the machines, and whether there had been a breach of warranty that they were in a good condition at the places named and free from all liens and charges.

Upon the point whether there had in fact been a delivery of actual possession by the defendants to the plaintiff of all or of any of the machines, there seems to be some confusion. The bill of exceptions, of course, and properly, does not set out all the evidence, but the court in its general charge stated to the jury "that the plaintiff admits that all the machines had been delivered to him." From the context it would appear that the contract of November 5, 1877, is treated as an admission to that effect as to all machines that were in fact at the places named, without respect to their condition—based, no doubt, upon the expression contained in the instrument, by which it is declared that said second parties, Marsh & Marsh, hereby acknowledge payment of all said machines, &c., and hereby deliver all thereof to said first party at the places

named in said within list, &c., free and clear of all liens, charges, or taxes, &c. The contract undoubtedly had the effect to pass the title to the machines from Marsh & Marsh to McPherson, and the right of possession; but whether the purchaser obtained actual possession could not be conclusively inferred from the contract merely. If the declaration in that instrument of the fact of delivery could have that effect, it would be equally conclusive that they were free of incumbrances, for that is also stated in the same connection. It might have been that the machines were in the places mentioned in the contract and in the condition required, yet the defendants might have refused to deliver actual possession. If so, they would, of course, be liable in damages.

The bill of exceptions recites that, "during the trial, evidence having been admitted tending to prove that many of the machines named in the contracts copied in the pleadings were not in as good condition as called for in the said contracts, and were not supplied with all the pieces specified in the contracts, and that in some instances the whole machine was missing, and what the values of such deficient or impaired machines in the condition in which they then were, and the difference in their values in such condition and the condition called for by the contract, and also on the part of the defendants that defendants had made repairs on some machines and supplied deficiencies and missing machines since the commencement of this action, and the value thereof," the court, at the request of the plaintiff, gave to the jury the following instruction:

"The jury is instructed that they are not permitted to take into account or make any allowance or reductions from the damages of the plaintiff for repairs of any kind made upon the machines or supplies furnished for them after November 5, 1877, all such acts on their part being without authority; and the plaintiff is entitled to recover the full measure of his damages as if no such repairs had ever been made."

This charge is clearly erroneous. In the first place it assumes the fact that the acts referred to, of making repairs and furnish-

ing supplies, were without authority. It would not be denied, we assume, that if authorized they would have to be considered; and whether authorized or not was, at least, one of the questions of fact involved in the issues to be tried, on which it was the duty of the jury to pass;—for the defendants had set up in their answer what they claimed to be an agreement with the plaintiff, by which they were to have until the spring of 1878 in which to make good their warranty as to the condition of the machines. Whether this agreement for an extension of time, not acted on, could be pleaded as a bar to the action for a breach of the contract, is not the question. It was, if proved, and if repairs were actually made in pursuance of it, certainly good as proof that they were made with the consent and authority of the plaintiff; and as the bill of exceptions recites that evidence was offered to maintain the issues, by both parties, it is not to be assumed that there was none in support of this claim.

But, independent of this alleged agreement, it was certainly competent for the defense to show that, after the date of the second contract, the machines were put in the good condition required by it, and were then delivered to and accepted by the plaintiff; for if the plaintiff accepted the machines after the time when they should have been delivered, or after they were received by him permitted repairs to be made or supplies to be furnished, and accepted the benefit of them, he certainly cannot claim that he has been damaged by a breach of the contract to the same extent as if nothing had been done to make good his loss.

It is a rule of law, without exception so far as we are aware, that any circumstances, otherwise competent in evidence to reduce the damages, may be proven on the trial for that purpose, although it may not have come into existence until after the commencement of the action.

The court also, at the request of the plaintiff, gave to the jury the following charges:

"10. The jury is instructed that the plaintiff is entitled to

recover for any machines which were not at the places named at the time of the making of the contract of November 5, 1877, the price of said machines as fixed in the contract; and if you find that the defendants failed to deliver any of the machines to be delivered at Lewisburg, Pennsylvania, after demand made by plaintiff, the plaintiff is entitled to recover the contract price of such machines." And also: "11. On such machines as were delivered to the plaintiff he is entitled to recover for any defects in quality or condition, and the measure of his damages is the difference between the value of such machines in the condition in which they then were and the contract price."

And refused to give, on the request of the defendants, the following:

"The jury are instructed that if they find there was any breach of the warranty named in the contract of November 5, 1877, that the measure of damages for such breach is the difference in the value of such machines as they actually were and as they were warranted to be, less the benefit to the property by what the defendants have done to make good such warranty."

During the trial the defendants offered to prove the market value of such machines in good condition for cash, and the difference between that and the value of the machines in the condition in which they were delivered; but this offer was rejected.

In its general charge the court stated the rule of damages very clearly and correctly, in the following language: "The extent of the damages in this case will be the difference that it would cost to put the machines in good condition, so as to comply with the contract, and also the value of those that were not then at the time and place stated in the contract." Standing alone, this instruction would have been unexceptionable. But in the rulings noted above, in giving the tenth and eleventh instructions asked by the plaintiff, and refusing to give that asked by the defendants, and in rejecting the evidence offered on the point, there was substantial error.

Opinion of the court.

The price fixed in the contract at which the plaintiff agreed to take the machines, whether the transaction is viewed as an exchange of property, at assumed valuations, or as a purchase and sale for money, is not conclusive between the parties upon the question of damages recoverable for a breach. If there had been a total failure on the part of the defendants below to comply with the contract, and they had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which, at the time of the breach, he could have supplied himself by purchase from others with the same number of similar articles of equal value. If the market price had in the meantime advanced, the recovery would be for more, or if it had fallen it would be for less, than the contract price; the rule to measure the loss in such cases being the difference between the contract and the market price. The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs; and, as to freedom from liens, the cost of removing them, if that be the difference in actual value between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference, in the actual circumstances of the case, is shown to be, is the true rule and measure of damages. Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price. (Benjamin *v.* Hillard, 23 How., 149–167.)

For these errors the judgment of the Circuit Court is reversed and the cause remanded with instructions to grant a new trial; and it is so ordered.

REVERSED.

Statement of the case.

THE UNITED STATES v. LEWIS RINDSKOPF, RAPHAEL REICHMANN, AND ELIAS RINDSKOPF.

April 24, 1882.

1. The practice of setting out in the bill of exceptions the entire charge of the court, instead of those parts only which are complained of, again condemned.
2. While there may be cases in which an assessment made by the commissioner of internal revenue must stand as an entirety or not at all, *e. g.*, where an erroneous rate has been adopted by the officer, or where its validity depends upon his jurisdiction, yet, where the question is as to the quantity of spirits produced on which taxes were not paid, every material fact on which the assessment was made is open to proof, and it will stand to the extent in which it is not impaired.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This is an action against the principal and sureties on a distiller's bond for $7,000, executed March 23, 1875. The principal was then engaged in the business of a distiller within the first collection district of Wisconsin. The condition of the bond provided, among other things, that he should "comply with all the provisions of law in relation to the duties and business of distillers." The complaint alleges as a breach of these conditions the non-payment of the tax due on 3,640 gallons of spirits distilled by him at his distillery between the 25th of April and the 1st of May, 1875, amounting to $3,276. It also alleges that the commissioner of internal revenue assessed the tax against him on the special list for October of that year, and that the assessment was returned to the collector of the district, who demanded payment of the tax, which was refused.

The answer contained a general denial, and also set up as a special defense that on the 1st of November, 1875, the commissioner of internal revenue made an assessment upon the distiller to the amount of $7,117.70 for spirits alleged to have been manufactured at his distillery in the month of April, 1875, and removed therefrom without payment of the tax

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thereon, and with intent to defraud the government; that this assessment was returned to the collector of the district, who demanded payment of the tax; that afterwards, in May, 1876, the plaintiffs brought a suit in equity to enforce its collection; that the distiller was served with process and answered the complaint, averring that the assessment was illegal and void; that that suit was still pending; and that the assessment mentioned in the complaint here was upon the same spirits for which the above assessment of $7,117 was made.

A supplemental and amended answer repeated these allegations, and added that the equity case was heard in April, 1879, when the assessment was adjudged to be illegal and the bill was dismissed. The answer pleads the decree entered in bar of the present action.

The case was tried at the January term of the court in 1880. There is no statement of the evidence or of its purport in the record, except as appears in the charge given to the jury. The bill of exceptions states that the plaintiffs offered evidence tending to maintain the issues on their part, "as is generally stated in the charge of the court hereinafter contained;" and that the defendants offered evidence tending to maintain the issues on their part, "as is in like manner stated in the charge of the court." Then follows the charge at length, at the end of which particular parts of it are indicated to which exceptions were taken, and among others the following: "To all that portion of said charge which defines and sets forth the legal force and effect of an assessment and the means whereby it may be attacked and overcome; to all of that portion of said charge which touches the entirety of the assessment and affirms that the plaintiffs must recover the exact amount of the assessment or nothing." That portion of the charge to which reference is thus made is found in different passages, which are as follows. After speaking of the power of the commissioner of internal revenue to make an assessment, the court said:

"When, therefore, an assessment has been made by this

officer it is to be presumed, until such presumption is overcome by proof to the contrary, that it was made upon sufficient evidence, and it is not necessary that the evidence upon which the commissioner acted should be laid before the jury. In other words, the jury have a right to presume until the contrary appears that when the commissioner made the assessment in question he had before him proofs which were sufficient to satisfy a just and fair-minded person that such assessment ought to be made; and before the jury can disregard the assessment they should be convinced by the evidence that the commissioner acted in making it in a manner unjust to the defendant distiller and unwarranted by the actual facts. Such an assessment is not, however, conclusive evidence of the liability of the distiller; it is open to attack; it is *prima-facie* proof only of such liability, and *prima-facie* evidence is such evidence as is sufficient when unassailed to establish a given fact, and it remains sufficient for that purpose until it is rebutted and overcome. * * * Upon introduction of the assessment in evidence a *prima-facie* case of liability on the part of the defendant Lewis Rindskopf is made. The burden of proof then falls upon the defendants, who may proceed to introduce evidence to overcome the assessment by showing that the defendant Lewis Rindskopf did not, during the period covered by the assessment, manufacture and remove from his distillery spirits upon which the tax was not paid.

"And upon it being so made to appear the burden of proof then shifts to the plaintiffs, and it then becomes incumbent on the plaintiffs to maintain and establish the correctness of the assessment by sufficient and competent evidence. * * * The order of proof which has been maintained upon the trial is in consonance with the rules of law applicable to such a case, which have just been stated."

And, after commenting upon the general character of the evidence in the case, the court further said:

"In passing upon the validity of this assessment, and in determining the question of liability on account of it, it is to be

taken and considered in its entirety. Either the government is entitled to recover the exact amount of the assessment, namely, the sum of $3,276, or it is not entitled to recover any sum whatever. The court and jury upon an investigation of the justness and validity of the assessment have no right to exercise the powers committed to the commissioner, but our right is limited to an inquiry into the question as to whether the assessment which has been made embraces or represents a just and valid demand against the defendant distiller, and as the result of such investigation it must either wholly stand or wholly fall."

In support of the special defense, founded upon the decree in the equity case, that the assessment of November 1 was invalid, the defendants produced the record of the assessment and of the suit, which was admitted in evidence against the objection of the attorney of the government—the court stating that proper instructions would be given to the jury in relation to the same. No proof was offered that the assessment covered the spirits for which the first assessment was made; and the court instructed the jury that without such proof the record would not be a bar to the prosecution of this action.

The jury found for the defendants, and upon their verdict judgment was entered; to review which the case is brought to this court on writ of error.

S. F. Phillips, *Solicitor-General*, for plaintiffs in error.

J. P. C. Cottrill, *L. Abraham*, and *C. E. Mayer*, for defendants in error.

FIELD, J.—The bill of exceptions in this case sets forth the charge of the court below in full, in disregard of our frequent condemnation of this practice. Only such parts should have been given as would point the exceptions; all else is unnecessary, and produces only inconvenience. We repeat of this practice what we said of another practice not uncommon, and equally objectionable—that of inserting the entire evidence in

the record: "If counsel will not heed our admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions." (Lincoln *v.* Laflin, 7 Wall., 137.)

The assessment of the commissioner of internal revenue was only *prima-facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima-facie* case of liability against the distiller, and nothing more. If not impeached it was sufficient to justify a recovery; but every material fact upon which his liability was asserted was open to contestation. The distiller and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment. They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller's liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due. The court, therefore, erred in instructing the jury that the assessment was to be taken and considered in its entirety, and that the government was entitled to recover the exact amount assessed, or not any sum. In other respects the charge as given above correctly presents the law.

There may undoubtedly be cases where an assessment must stand as an entirety, or not at all; as, where an erroneous rate has been adopted by the officer; or where it is impossible to separate from the property assessed the part which is exempt from the tax; or where its validity depends upon the jurisdiction of the commissioner. The present case does not fall within either of these classes. Here the question is as to the quantity of spirits produced on which taxes were not paid.

The decree in the equity suit was properly held not to be a bar to the prosecution of this action in the absence of proof that the assessment which it adjudged invalid covered the

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spirits upon which the assessment here was made. The instruction to the jury deprived it of any weight as evidence with them.

The judgment must, therefore, be reversed and the case remanded for a new trial; and it is so ordered.

REVERSED.

JULIA P. WARREN, EXECUTRIX OF MOSES WARREN, DECEASED, v. JOSEPH M. STODDART.

April 24, 1882.

A book agent contracts with a publishing-house to canvass for a certain work to be published in serial volumes. After having obtained subscribers in large numbers, he takes the agency from another house to canvass for a rival edition of the same work, and induces many of the former subscribers to take for the volumes not yet issued the rival edition. On applying to the house first employing him to furnish volumes to fill his orders, they refuse to do so, except for cash accompanying the order: *Held*—

1. That having abrogated the contract by his own act, he could not claim the benefit of a provision in that contract giving him credit.

2. That even if his acts did not amount to an abrogation of the contract, it was his duty to save himself from all loss possible; and he could charge the delinquent only with such damages as he could not reasonably prevent.

3. That in case of a violation of a contract to sell on a certain credit, the measure of damages is interest for the period of the credit.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The defendant in error, J. M. Stoddart, was a book publisher, carrying on business in the city of Philadelphia, under the name of J. M. Stoddart & Co. In 1878 he undertook to reprint and sell in the United States a new edition, consisting of twenty-one volumes, of the Encyclopædia Britannica, which A. & C. Black, of Edinburgh, Scotland, were then bringing out.

Stoddart's plan was to sell the work by subscription only;

the subscriptions were to be obtained by agents and canvassers, to whom certain territory was to be allotted. It was expected that the work would be printed and published at the rate of about three volumes per year.

Moses Warren, the plaintiff in error, was an agent in the city of Chicago for the sale of subscription books; that is, books sold only by subscription. On February 24, 1877, Stoddart and Warren entered into a contract in writing, whereby Stoddart appointed Warren his general agent for the sale of his American reprint of the encyclopædia in certain territory therein named. The contract was as follows:

"PHILADELPHIA, *Feb.* 24, 1877.

"Agreement entered into this day between J. M. Stoddart & Co., of Philadelphia, Pa., and Moses Warren, of Chicago, Ill.

"The said J. M. Stoddart & Co. agree to give the said Moses Warren a general agency for the sale of the American reprint of the Encyclopædia Britannica in the following territory."

Here follows a description of the territory, consisting of several States and parts of States, and a list of the prices at which Stoddart & Co. agreed to furnish Warren with the books in various styles of binding. The contract then proceeds:

"Said J. M. Stoddart & Co. also agree to give to said Moses Warren the exclusive right to sell the Encyclopædia Britannica within the above-named territory during such time as said Warren shall faithfully perform his part of the agreement as hereinafter stated.

"1st. Said Warren agrees to use his best endeavors to promote the sale of the ——— Britannica in the above-assigned field.

"2d. To send to J. M. Stoddart & Co. a weekly report of the number of orders taken the week previous.

"3d. To fill no orders outside of his assigned field.

"4th. To leave no volumes with booksellers to sell or display in their stores.

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"5th. To furnish no volumes at less than the regular retail price.

"6th. To remit on the seventh day of the month one-half the amount of monthly statement for previous month, and to remit on the twenty-sixth day of the month the remaining one-half of said monthly statement.

"Witness our hand and seal on the day and date above mentioned.

"J. M. STODDART & CO. [SEAL.]
"MOSES WARREN." [SEAL.]

Warren at once entered upon the performance of this contract, and by April 20, 1878, had obtained and reported to Stoddart subscriptions for 1,733 sets of the work, and had delivered to subscribers a portion of the volumes of the work which had been issued up to that time; on an average less than four volumes to each subscriber.

In the latter part of the year 1877 or early in 1878 the Scotch publishers of the encyclopædia and the house of Scribner & Armstrong, of New York, formed a plan to issue in this country an edition of the encyclopædia, to compete with the reprint of Stoddart, by striking off sheets from the original stereotype plates and engravings of the Scotch edition and sending them to this country to be bound and sold by subscription, on substantially the same plan as that which had been adopted by Stoddart to put his reprint into circulation.

Some time in May, 1878, Scribner & Armstrong commenced negotiations with Warren, which resulted in a contract between them, dated May 14, 1878, by which Scribner & Armstrong constituted Warren their agent, with the exclusive right to sell, until its publication was completed, their edition of the encyclopædia within the same territory substantially as that mentioned in the contract between Stoddart and Warren, and agreed to furnish him with copies of the encyclopædia at prices therein named. Warren stipulated on his part that from and after the date of the contract he would not canvass for any other encyclopædia, or any other edition of any encyclopædia,

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but that he "should have the privilege of completing orders already taken for the reprint edition of Stoddart to all subscribers therefor."

After the making of this contract Warren refused to canvass further for Stoddart's reprint edition. Whereupon Stoddart refused to furnish Warren, except for cash delivery, the books with which to fill the orders which he had obtained for Stoddart's reprint edition.

Upon this point the evidence was as follows: On June 5, 1878, Warren sent an order to Stoddart requesting him to forward a certain number of books to be furnished subscribers, to which Stoddart replied, by letter dated June 6, 1878, that "as to all future orders, for the present they will be filled when cash accompanies the orders."

On June 10, 1878, Warren wrote to Stoddart as follows: "I am desirous of delivering reprint fast as possible on my orders heretofore taken for same. If my orders for stock are filled they shall be paid for according to contract. Do you intend to fill my orders on that basis?"

To this letter Stoddart replied by telegraph, as follows: "Will fill order when cash is received, in accordance with our letter of June 6." There is no evidence that Stoddart ever refused to fill a cash order, nor was it pretended that Warren, after that date, ever sent an order to Stoddart with the cash to pay for the books ordered.

After the refusal of Stoddart to supply Warren with the books except for cash, the latter induced one thousand two hundred and fifty-three of the subscribers to Stoddart's reprint edition to exchange the subscription to the reprint for a subscription to the Scotch edition, and he claimed that he expended in obtaining their exchange an average of four dollars for each subscription, making a total of $5,012. He also claimed that the Stoddart reprint volumes taken back from said subscribers were worth $12,206 less than the amount paid by him to Stoddart for them, and less than what he could sell them for in the market. Warren also claimed that he lost his profits on four

hundred and eighty orders which were not exchanged, amounting to the sum of $20,073.

This suit was brought by Stoddart to recover of Warren the sum of $2,976.53 for books furnished him to supply his subscribers. It was not disputed by Warren that the amount sued for was due and owing from him to Stoddart. But Warren, by way of set-off, averred the making of the contract with Stoddart above set forth, and claimed that he had been damaged by the refusal of Stoddart to perform the contract, in the sum of $30,000.

Upon the trial of the case in the Circuit Court the judge instructed the jury that the defendant's claim for damages could not be allowed as against the plaintiff's claim in the suit, and that the plaintiff was entitled to a verdict for the full amount sued for by him and admitted to be due, namely, two thousand nine hundred and seventy-six dollars and fifty-three cents. The jury returned a verdict accordingly, on which judgment was entered. This writ of error is prosecuted to reverse that judgment.

Van H. Higgins, for plaintiff in error.

Isaac N. Arnold, for defendant in error.

WOODS, J.—The only question in the case is whether or not the instruction of the court to the jury, to the effect that, on the facts, the plaintiff in error was entitled to no damages, is correct. This will depend upon the construction which is to be put on the contract between Stoddart and Warren of February 24, 1877.

The contract is indefinite as to the time during which it was to continue in force. It is probable that the parties supposed the contract would continue until the twenty-one volumes were published, or at least until the territory named in the contract had been thoroughly canvassed. But no time was mentioned in the contract, nor did it make any provision with respect to the unfilled orders in case of its termination before the publi-

cation was completed, and we are left to construe it and settle the rights of the parties under it as they have made it.

The complaint of Warren is not that Stoddart refused to furnish him with the books necessary to fill the orders he had taken, nor that he refused to furnish the books at the price fixed by their contract. His sole complaint is that Stoddart refused to furnish the books on a credit of about thirty days, which Warren insists the contract provided for, and demanded the cash.

He claims that after he had stopped canvassing for the reprint of Stoddart, and had made a contract with and entered into the service of a rival publisher of the same work, and had begun in the interest of the rival publisher a canvass of the same territory which had been allotted to him exclusively by his contract with Stoddart, he had the right, upon the refusal of the latter to furnish the books on thirty days' credit, to obtain a cancellation of the orders he had taken for Stoddart's reprint, and substitute therefor orders for the rival edition and charge the expense of the substitution to Stoddart.

We think it entirely clear that he had no such right. There was no express provision in the contract between Warren and Stoddart which required the latter to furnish the books on credit, and we think that the provision of the contract that Warren should remit on the seventh day of the month one-half the amount of monthly statement for previous month, and on the twenty-sixth day the remaining half, was not continued in force after Warren had terminated the contract and abandoned the service of Stoddart under it.

Although the contract fixed no time during which it was to continue in force, yet we think when either party terminated it the other was no longer bound by its provisions. It gave Warren the exclusive right to sell the books within certain territory, and by it Stoddart agreed to furnish them to him at stipulated prices and on stipulated terms. On his part Warren agreed to use his best endeavors to promote the sale of the work in the field exclusively assigned to him. These

clauses of the contract were reciprocal, and the performance of one was the consideration for the performance of the other. When Warren ceased to canvass for Stoddart's books he had no right to demand the books at the prices or the terms mentioned in the contract.

But even conceding that the provision referred to remained in force after Warren had declined to go on under the contract, it does not follow that upon the refusal of Stoddart to give Warren a credit of thirty days upon the books the latter could obtain a cancellation of the orders he had taken for Stoddart's reprint and substitute orders for the Scotch edition and charge the expense of so doing to Stoddart. The claim that upon a simple refusal of Stoddart to allow him a thirty days' credit upon the books as he ordered them, he could go on and substitute other orders for another book and charge Stoddart with the expense of substitution, amounting to $30,000, is, to say the least, a remarkable one. The damage sustained by Warren because he did not get the thirty days' credit which he thinks he was entitled to is not to be measured in that way.

The rule is that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. (Wicker *v.* Hoppack, 6 Wall., 94; Miller *v.* Mariners' Church, 7 Greenlf., 56; Russell *v.* Butterfield, 21 Wend., 304; Ketchell *v.* Burns, 24 Wend., 457; United States *v.* Burnham, 1 Mason, 57; Taylor *v.* Read, 4 Paige, 571.)

The course pursued by Warren was not necessary to his own protection. He might either have paid Stoddart cash for the books required to fill his orders, or have allowed Stoddart to fill the orders and divide the profits of the business between them on equitable terms. The law required him to take that course by which he could secure himself with the least damage to the defendant in error. Instead of this he unnecessarily

destroys a valuable interest of Stoddart in the business in which they were jointly engaged, and then seeks to charge him with the great expense and damage which he brought on himself in so doing.

If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders. As no proof was given to show that Warren had ever paid cash for any books ordered by him, he would only be entitled, in any view of the case, to nominal damages.

But, as we have already said, Stoddart was not bound by the contract to furnish the books on credit after Warren had gone over to a rival publisher and refused to go on under his contract. We think, therefore, that the court below was right in saying to the jury that Warren was entitled to no damages at all.

Judgment affirmed. AFFIRMED.

THE AMERICAN LIFE INSURANCE CO. v. THE TOWN OF BRUCE.

April 24, 1882.

1. A city which has by a local statute the right to make a subscription on condition in aid of a railroad cannot, when its officers have issued its bonds containing no notice in their recitals of any condition, set up as against a *bona-fide* holder that the bonds are void for non-compliance with certain conditions, even though the statute authorizing their issue expressly provides that they shall not be valid till such conditions are complied with.
2. Kohn *v.* Eagle, 84 Ill., 292, distinguished.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Henry Hazlehurst, *Isaac Hazlehurst*, and *G. L. Fort*, for plaintiff in error.

P. Phillips and *W. Hallet Phillips*, for defendant in error.

Opinion of the court.

HARLAN, J.—This action involves the liability of the town of Bruce, in the State of Illinois, upon sundry interest coupons attached to bonds in the ordinary form of negotiable municipal bonds. On the 1st day of December, 1870, and by the constituted authorities of the town, they were delivered to the Plymouth, Kankakee and Pacific Railroad Company in payment of a subscription to the capital stock of the Kankakee and Illinois River Railroad Company. The latter company, after organization, became consolidated with the former, and hence the delivery to the consolidated company. The bonds upon their face recite that they are "issued by virtue of the law of the State of Illinois, entitled 'An act to incorporate the Kankakee and Illinois River Railroad Company,' approved April 15, 1869, and 'An act to fund and provide for paying railroad debts of counties, townships, cities, and towns, in force April 16, 1879;' and we, the supervisor and town clerk of the township of Bruce, do hereby certify that a special election was held in said township on the 7th day of September, 1869, at which special election a majority of the legal voters, participating at the same, voted 'for subscription' to the capital stock of the Kankakee and Illinois River Railroad Company in the sum of $25,000, and to issue bonds of said township therefor; and said special election was by the proper authorities then and there duly declared carried 'for subscription,' and that all the other requirements of the law in relation to said special election were duly complied with."

The act of April 15, 1869, is the charter of the railroad company. By the sixteenth section thereof it is made the duty of the supervisor or clerk of any town or township, declaring by a majority of its voters in favor of subscription to the capital stock of the railroad company, to make the subscription, receive the proper certificates, and execute bonds therefor, which shall be delivered to the president or secretary of said railroad company for the use of said company, and shall be a pledge upon the revenue of said territories respectively. (Sess. Laws Ills. 1869, vol. 3, p. 1.)

The coupons in suit, before their maturity, to wit, on the 19th of June, 1871, together with the bonds to which they are severally attached, were purchased by plaintiff in error from one Alexander Whilden, the lawful and *bona-fide* holder thereof, for the sum of $9,500 cash in hand paid. Neither Whilden nor the insurance company had any notice at the time of any irregularity, invalidity, or informality in the making, issuing, or delivery of the bonds.

It is not seriously disputed, either in the pleadings or in argument, that the acts of assembly referred to in the bonds gave ample authority for subscription by the town to the capital stock of the Kankakee and Illinois River Railroad Company, to be paid for in bonds of the town, provided a majority of legal voters, at an election previously called and held for that purpose, expressed their approval of such subscription and its payment in that mode. But the contention of the town is: 1st. That by the seventh section of the act of April 16, 1869, it is provided that "any county, township, city, or town shall have the *right*, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions, or donations shall not be valid and binding until such conditions precedent shall have been complied with." 2d. That in pursuance of the authority thus given, the town voted to make a subscription of $25,000, to be paid for in bonds, subject to the following conditions, distinctly set forth in the notice under which the election was held, and assented to by the railroad company, viz.: that the road be so constructed as to pass through the town, making Streater a point in a northwesterly direction towards Bureau Junction; that a depot be located and maintained in the town of Bruce; that the bonds be delivered in sums of $1,000 for every mile of road graded as the work progresses, and $1,000 for every mile of ties laid, and the balance when the road-bed is ready for the iron; and that no further calls or assessments shall be made upon the town or upon the subscription to stock over

the amount aforesaid; provided, nevertheless, that the subscription be void and of no effect unless an agreement by the railroad company for said iron and rolling stock with responsible parties shall be made on or before one year from the day of the election, and the railroad company shall have formed satisfactory arrangements to connect said railroad with some eastern terminus. 3d. That the conditions thus prescribed have never been complied with in these respects; more than one year elapsed after the election and yet no agreement had been made on or before September 7, 1870, by the original or consolidated company, with any party for the iron or the rolling stock of the railroad; the road was never so constructed as to pass through the town of Bruce; it was not constructed when the bonds were issued, and has never been constructed at any time since; no depot has ever been located or maintained in the town; the ties were never laid for any one mile of the railroad within the town; and no part of the railroad for the line of railroad of the Kankakee and Illinois River Railroad Company, or of the original line of the original Plymouth, Kankakee and Pacific Railroad, has ever been constructed.

These facts are set out in detail in the special plea of the town. As against a *bona-fide* holder for value of the bonds and their coupons, do they constitute a defense? Or, to state the question more distinctly, can the town, after the bonds have been signed, sealed, and delivered by its constituted authorities to the railroad company, and have passed into the hands of *bona-fide* holders for value, escape liability by showing that the conditions, or some of them, imposed by popular vote have not been complied with upon the part of the railroad company?

The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute the town could issue and deliver bonds for the subscription in ad-

vance of the construction of any part of the road. But when conditions were prescribed, good faith and the obligations which everywhere arise out of negotiable securities required —if the town intended to rely upon them—that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals that the town had exercised its statutory right to impose conditions upon its liability. The officers both of the town and the railroad company knew, however, that bonds could not have been negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town and the officers or agents of the company co-operated in putting out bonds negotiable in form and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals full of everything necessary to induce the public to buy the bonds. The statement on the face of the bonds that they were issued by virtue of the statutes of April 15, 1869, and April 16, 1869, (the first of which contains *an absolute requirement that the bonds be issued and delivered upon the subscription being voted*, while the second gives the *right*, but does not make it imperative, to impose conditions,) and the further statement that the people had voted for subscription *and to issue township bonds therefor*, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona-fide* purchasers. Under these circumstances, the town, by every principle of justice, is estopped, as against a *bona-fide* holder, to plead conditions the fact of the existence of which was withheld from the public for one or two reasons, either to facilitate their negotiation in the markets of the country, or in reliance upon the railroad company meeting the prescribed conditions. It should not now be

heard to make a defense inconsistent with the representations contained in the recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed.

But this conclusion, it is contended, is in the face of the express declaration in the act of April 16, 1869, that subscriptions or donations made and bonds issued upon conditions "shall not be valid and binding until such conditions precedent shall have been complied with." And in support of that contention counsel cite Kohn *v.* Eagle, 84 Ill., 292, in which case one of the justices dissented and another did not sit. That case involved the liability of the town of Eagle upon certain coupons of bonds issued to the same railroad company. The defense was there, as here, non-compliance with certain conditions which had been attached by popular vote to the subscription. The court, construing the before-mentioned act of April 16, 1869, held that there was *no want of power* to make the subscription and to issue bonds; that, if the town so willed, *the subscription could be made and bonds issued in advance of compliance with any conditions imposed by popular vote;* that, aside from the statute, innocent purchasers for value would enjoy the protection accorded to *bona-fide* holders of negotiable paper, and would not be affected by non-compliance with such conditions; that such holders could not be required to take notice of the conditions or of any resolution relating to them upon the records of the railroad company; but that, in view of the express provision of the statute that the bonds should not be "valid and binding until such conditions precedent shall have been complied with," non-compliance therewith is a good defense, even against purchasers in good faith for value. The decision in that case was made several years after the bonds had been put on the market, but being a construction of a local statute, it is insisted that the Federal court is bound to accept it as controlling in the present case. We waive discussion as to the soundness of the conclusion reached by the State court, or any extended examination of the authorities bearing

upon the general question whether the Federal court is concluded by the construction given by the State court to a local statute, under which rights have accrued to citizens of other States before that construction was given. We do this because the present case is distinguishable from Kohn *v.* Town of Eagle in this: that it does not appear from the report of the latter case that the town had by the recitals in its bonds estopped itself from asserting, as against a *bona-fide* holder, the non-performance of conditions imposed by popular vote. Had the town of Eagle represented in express words, upon the face of the bonds, that no conditions whatever were prescribed by the people, or that the subscription was unconditional, the State court would not, we suppose, adjudge that the town, as against a *bona-fide* holder, could take shelter behind the statutory provision in question. In the present case the town of Bruce did not make, in express terms, a representation of that character. But, in effect, by the recitals in its bonds, it did represent to the public that the bonds were issued in all respects in conformity to law, and that nothing remained to be done which was essential to its liability thereon. The town having power, under the statute, to make an unconditional subscription and to issue and deliver its bonds in advance of the construction of the road, what was said in Brooklyn *v.* Ins. Co., 99 U. S., 370, may be repeated here: "It is now too late for the town to claim exemption, as against *bona-fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice, either from the statute or otherwise."

The judgment is reversed with directions for further proceedings in conformity with this opinion.

REVERSED.

Statement of the case.

EMILY SULLIVAN ET AL. v. H. BURNETT ET AL.

April 24, 1882.

1. The Missouri statutes of descent, as regards aliens, *construed* to mean that aliens residing in the United States who have made a declaration of intent to become citizens, and those residing in Missouri whether they have made such declaration or not, are entitled to acquire and hold real estate; and that the right conferred upon aliens by the act of 1855 to sell and convey real estate within a prescribed time referred only to cases in which the property would vest at once in the State for the want of some person who could inherit, and had no reference to those classes who were allowed to acquire and hold in the same manner as citizens of the United States, as above set forth.
2. And the section of the statute declaring that "in making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent is or has been an alien," *construed*, in view of the policy of Missouri on the subject, and notwithstanding the case of McCreery *v.* Somerville, 9 Wh., 354, to allow the children of an alien ancestor to inherit and claim through that ancestor, although such ancestor, at the time descent was cast, was living and himself incapable of inheriting.
3. The Missouri statute of March 30, 1872, conferring upon aliens the power to acquire and hold real estate, is prospective in its operation.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The following are the material portions of the statutes referred to in the opinion of the court:

"Chapter 110 of the General Statutes of Missouri of 1865, page 448, 'of the acquisition and conveyance of real estate by aliens.'

"SECTION 1. All aliens residing in the United States who shall have made a declaration of their intention to become citizens of the United States by taking the oath required by law, and all aliens residents of this State, shall be capable of acquiring real estate in this State by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States.

"SECTION 2. It shall be lawful for every alien who, except

for his alienage, would be capable of acquiring real estate by devise or descent from any person thereafter dying, capable of holding at the time of his death real estate in this State, to sell and convey, in the manner provided by law for the conveyance of real estate, any real estate which he may acquire by virtue of this section, to any other person capable of holding real estate by virtue of the laws of this State; and such sale and conveyance, when executed and delivered in the manner provided, shall have the effect to pass all the title to any real estate which such alien may have acquired to the same by descent or devise.

"SECTION 3. All such sales and conveyances shall be null and void unless made in good faith within three years next after the final settlement of the estate of the ancestor or devisor; provided that if such real estate be in litigation between such alien and any other person, then such real estate, or so much thereof as shall have been in litigation, shall be sold and conveyed within three years after the termination of such litigation."

"Chapter 129 of the General Statutes, page 517, 'of descents and distributions.'

"SECTION 1. When any person having title to any real estate of inheritance, or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following course: First, to his children, or their descendants, in equal parts; second, if there be no children or their descendants, then to his father, mother, brothers and sisters, and their descendants in equal parts; third, if there be no children or their descendants, father, mother, brother or sister, nor their descendants, then to the husband or wife; if there be no husband or wife, then to the grandfather, grandmother, uncles and aunts, and their descendants in equal parts; fourth, if there be no children or their descendants, father, mother, brother, sister, or their de-

scendants, husband or wife, grandfather, grandmother, uncles, aunts, nor their descendants, then to the great-grandfathers, great-grandmothers, and their descendants in equal parts; and so on in other cases without end, passing to the nearest lineal ancestors and their children and their descendants in equal parts. * * *

"SECTION 8. In making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate is or has been an alien."

The only material portion of the act of 1872 is quoted in the opinion.

Willoughby N. Smith and *L. B. Valliant*, for plaintiffs in error.

G. A. Finkelnburg and *E. C. Kehr*, for defendants in error.

HARLAN, J.—This action, under the local law equivalent to an action of ejectment, involves the title to certain real estate in the city of St. Louis, of which Edward Sullivan, an intestate naturalized citizen of the United States, was the owner and in possession at the time of his death, in the year 1866.

The appellants, plaintiffs below—a sister and a son of a deceased brother of the intestate—were at the death of the latter, as well as at the commencement of this action, residents of Ireland and subjects of the United Kingdom of Great Britain and Ireland. The defendants, it is sufficient to say, hold whatever title passed to a female lunatic, foreign-born and a first cousin of the intestate, residing at his death in Maryland, but who, so far as the record discloses, never made a declaration of her intention to become a citizen of the United States; also whatever title passed to the children of Annie Murta and Mary Murta, foreign-born first cousins, who, like the plaintiffs, were, at the death of the intestate, alive, residents of Ireland, and subjects of the United Kingdom of Great Britain and Ireland. But their children, also foreign-born, were, at the death of Edward Sullivan, naturalized citizens of the United States, one of them a resident of the State of Missouri.

The controlling question relates to the claim of appellants to an interest in the property in controversy.

The local statutes to which, as bearing upon case, our attention has been called, are chapter 110 of the Revised Statutes of Missouri 1865, sections 1 and 8 of chapter 129 of the same revision, and an act of the General Assembly of that State approved March 30, 1872. As these statutes may be printed at large by the reporter, they will not be here copied. The first section of chapter 110 of the revision of 1865 is a reproduction of previous statutory provisions which had been in force from a very early period after the admission of Missouri into the Union. (Rev. Stat. Mo. 1825, p. 126; Id. 1835, p. 66; Rev. Code of Mo. 1845, p. 113.) That section conferred upon two classes of aliens the same capacity of acquiring real estate in Missouri, by descent or purchase, and of holding and alienating the same, as is enjoyed by citizens of the United States,—those residing in this country who have made a declaration of intention to become citizens of the United States by taking the required oath, and those, whether they have made such declaration or not, who reside in the State of Missouri. Aliens not belonging to one or the other of those classes were left subject to the operation of the common-law rule—recognized as in force in Missouri—that an alien, for the want of inheritable blood, could not take land by descent. (Wacker *v.* Wacker, 26 Mo., 426; Black. Comm., Book II, 249; Orr *v.* Hodgson, 4 Wheat., 453.) The second, third, fourth, and fifth sections of chapter 110, as to their substantial provisions, are brought forward from an act approved February 22, 1855, which declares it to be "lawful for every alien who, except for his alienage, would be entitled to any real estate by devise or inheritance from any person hereafter dying, capable at the time of his death of holding real estate situate in that State, to legally sell for his own use, and convey the title thereof to any person capable of holding real estate situate within that State; provided he make such sale and conveyance within three years next after the death of him from whom he shall claim such devise or inherit-

ance." When the minor is an alien, such sale and conveyance is authorized to be made by his guardian. (Sess. Laws Mo. 1855, p. 4.)

It is quite clear that upon the death of Edward Sullivan neither of the plaintiffs took by descent any interest in his real estate, for the reason suggested by the very words of the statute, and fortified by the policy which dictated its enactment, that they were and are alien non-residents of the United States. This construction must be adopted, unless the object of the act of 1855 was, for purposes of descent, to obliterate all distinction between aliens residing in and those residing out of the United States. But no such interpretation is admissible, especially in view of the fact that the statute enacted previous to, as well as that of 1855, upon this general subject, were embodied in the same chapter of the general revision of 1865. The section declaring it lawful for an alien to sell and convey, within a prescribed time, to one capable of holding, real estate which, except for his alienage, he would have been capable of acquiring by devise or descent, has reference to cases not embraced by the first section of chapter 110, that is, to cases in which the property would vest at once in the State for the want of some person who could at common law, or under the statute, inherit. Aliens of the class described in the first section of chapter 110 could not inherit at common law, but by statute they were permitted to take by descent or purchase, holding, or selling and conveying, as it suited their convenience to do either. In all those respects aliens embraced by that section were placed upon the same footing of equality with citizens of the United States. But to an alien who did not have capacity to inherit by virtue of residence in Missouri, or of residence in the United States accompanied by a formal declaration, under oath, of intention to become a citizen, the right was given by the act of 1855, continued and enlarged in section 2 of chapter 110, (not to inherit and hold as a native or naturalized citizen could, but) to take and sell and convey to one who could hold. Until the law of 1855 was enacted, the right of the State to take the

real estate of one who left no person in existence capable of acquiring it by descent, accrued immediately upon the death of the owner. Impelled by a sense of justice, or to meet the hardships of cases likely to arise in a new State receiving large accessions to its population from Europe, Missouri, as a partial waiver or suspension of its rights, and for no other purpose, declared by the act of 1855 that an alien who did not reside in Missouri, or in this country with an intention to become a citizen of the United States, and who could not, therefore, inherit, might, within a limited period, sell and convey to one who could take and hold.

That statute plainly had no reference to those aliens upon whom had already been conferred by statute the capacity to inherit and hold, or to sell and convey, in the same manner as citizens of the United States.

But the contention of counsel for appellants is that the children of Annie and Mary Murta could not take this property, nor any interest in it, because their alien non-resident mothers, through whom was traced their relationship to the deceased, were alive at the death of the latter; and since the parents were incapable of taking, for the reasons we have given, their children could not take. Upon the basis of that conclusion counsel advance to the further proposition, that if neither appellants nor the Murta children could take by descent the property upon the death of the intestate escheated to the State, and the right of appellants to take as the nearest of kin was subsequently recognized and established by the act of March 30, 1872, the first section of which declares that "*all* aliens shall be capable of acquiring by purchase, devise, or descent real estate in this State, and of holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this State."

Although that statute was enacted within three years after the final settlement of Edward Sullivan's estate, and although its object was undoubtedly to remove the disabilities of aliens

of every class, whether resident or non-resident, to acquire real estate in Missouri by purchase, descent, or devise, we are of opinion that neither of the propositions just stated can be successfully maintained. The Murta children, we have seen, were naturalized citizens of the United States, one of them being also a resident of Missouri. At the time descent was cast they were the nearest of kin of the class of aliens who, by the first section of chapter 110, were capable of acquiring real estate in Missouri by descent or purchase. Their right to take by descent was not, as we think, affected by the fact that their respective mothers were, when the intestate died, alive, and alien non-residents of this country, incapable themselves of inheriting the estate. The eighth section of the chapter (129) on descents and distributions declares that "in making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent from the estate is or has been an alien." This language would seem to embrace as well the case of one whose alien progenitor, through whom is traced relationship to the intestate, was living when descent was cast, as the case where such progenitor was then dead. This view is controverted by plaintiffs in error, on the authority of McCreery *v.* Somerville, 9 Wh., 354, where this court had occasion to determine the meaning of the statute of 11 and 12 William III, ch. 6, which, it is claimed, is, upon the present point, identical with the foregoing section in the Missouri statute of descents and distribution. It was there ruled that the English statute (in force in Maryland, from which State the case came) removed the common-law disability to claim title through an alien ancestor, but did not apply to a living alien ancestor so as to create a title by heirship, where none would exist by the common law if the ancestor were a natural-born subject. We remark, in reference to that case, that the English statute is not accurately quoted in the opinion of the court, as an examination of 10 British Statutes at Large, 319, Pickering's edition, will show. But without deciding that the words omitted ought to have produced a judgment different

from that rendered, we are of opinion that the present case is not governed by McCreery *v.* Somerville. The statute of Missouri which permits the demandant to inherit from an intestate, notwithstanding his ancestor, through whom he derives his descent, is or has been an alien, must be interpreted as well in connection with other provisions conferring upon aliens the capacity to inherit real estate, as with reference to the public policy which manifestly induced such legislation. These provisions, in terms, make an alien resident in Missouri, or an alien resident elsewhere in this country, intending to become a citizen, capable of inheriting real estate by descent or purchase. In making title by descent it may be that his ancestor is or was an alien, without inheritable blood, either at common law or by statute. That fact would ordinarily constitute an insuperable difficulty in the way of his taking or holding the estate. But the statute elsewhere interposes in his behalf, and says that he shall not be barred in tracing his descent from the intestate by reason of the fact that *any* ancestor either *is* or has been an alien—language broad enough to include a living as well as a dead progenitor.

Unless the statute be so construed, it would result that, while an alien residing in Missouri, having no purpose to become a citizen of the United States, could, under the then existing law, if the nearest of kin, inherit and hold as fully as if he were a citizen of the United States, a naturalized citizen actually residing in Missouri would be barred from taking and holding by the fact—wholly unimportant in view of the policy of the State—that his parent or ancestor, through whom he must trace relationship to the intestate, was, when descent was cast, alive and an alien non-resident of the country, or a resident of the United States, outside of Missouri, with no intention to become a citizen. We are not satisfied that such an interpretation of the statute would be consistent with the intention of the Legislature, and therefore reject it as unsound.

But should we be in error in this construction, there is an-

other ground upon which the claim of appellants must be denied.

We have ruled that when descent was cast neither of the appellants had capacity to inherit, and if, as contended, the Murta children were also barred by the fact that their respective alien mothers were then living, it would result, as counsel concede, that the property escheated to the State immediately upon the death of Edward Sullivan. This upon the ground that the legal title could not be in abeyance. (2 Fearne on Remainders, 20.) In that contingency neither appellants nor appellees could claim any interest in the property by virtue of the act of 1872. The Constitution of Missouri forbids the General Assembly from passing any law retrospective in its operation. (Article 1, section 28.) And if that inhibition does not prevent the State from releasing, under the authority of a statute and for the benefit of individuals, any right of property it may have acquired by escheat, it is sufficient to say that the act of 1872 contains no language clearly indicating an intention to make it retrospective. It is consequently applicable alone to future acquisitions by aliens of real estate in Missouri.

We perceive no error in the judgment, and it is affirmed.

AFFIRMED.

THE CITY OF OTTAWA v. THE FIRST NATIONAL BANK OF PORTSMOUTH, NEW HAMPSHIRE.

April 24, 1882.

1. Whether bonds of a city issued to make a donation to a manufacturing company managed by private enterprise are, in the sense of the law, for a municipal purpose or not, yet where those bonds recite on their face that they were issued for municipal purposes, the city is estopped, as against a *bona-fide* holder, from setting up that they were not issued for a municipal purpose.
2. By the decisions of the Illinois court of last resort municipal bonds payable to bearer, or to some named person or bearer, are negotiable by delivery only, so as to authorize the holder to sue in his own name, and do not require any indorsement to pass title.

Opinion of the court.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

C. B. Lawrence, for plaintiff in error.

G. S. Eldredge, for defendant in error.

HARLAN, J.—The bonds in suit constitute a portion of the issue of $60,000 referred to in Hackett *v.* Ottawa, 99 U. S., 86. Like those held by Hackett, they were purchased before maturity, and without notice of any circumstances or facts impeaching their validity.

As in that case, so here, the bonds recite that they were issued in virtue of the power conferred by the charter of the city upon its council—the majority of voters, attending at an election for that purpose, assenting—to borrow money on its credit and to issue bonds pledging its revenue for the payment thereof; and also, in pursuance of two ordinances of the city council, one passed June 15, 1869, entitled "An ordinance to provide for a loan for *municipal* purposes," duly ratified by popular vote, and the other entitled "An ordinance to carry into effect the ordinance of June 15, 1869, entitled 'An ordinance to provide for a loan for *municipal* purposes.'" The defense in the Hackett case was that the bonds were not issued to effect a loan for municipal purposes, but were issued and delivered as a donation to one Cushman, or to the Ottawa Manufacturing Company, a private corporation, to be used in aid of a merely private enterprise, and not for legitimate municipal purposes. Upon that ground it was contended they were void for the want of authority to issue them. Waiving any direct decision of the question, much elaborated by counsel, as to what, under the Constitution of the State, as interpreted by the Supreme Court of Illinois in numerous cases, was to be regarded as a municipal or corporate purpose for which the city could lawfully exercise the power of borrowing money and issuing bonds, we there adjudged the defense to be insufficient for these reasons: The city council had power, the voters consenting, to

issue negotiable securities for certain municipal purposes; if the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation upon the face of the bonds that the ordinances provided for a loan for municipal purposes; such a representation by the constituted authorities of the city would naturally avert suspicion of bad faith upon their part, and induce purchasers to omit an examination of the ordinances themselves; and consequently the city was estopped, as against a *bona-fide* holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes. Upon these grounds the main defense in this suit must also be adjudged insufficient.

There is, however, one question raised in this case which was not made or determined in Hackett *v.* Ottawa. The bonds in suit are made payable at the St. Nicholas National Bank in the city of New York to W. H. W. Cushman or bearer, and were taken by defendant in error without any written assignment or indorsement by Cushman, the named payee. The city paid the interest maturing on the 2d days of August, 1870 and 1871.

The contention of counsel is that an assignment or indorsement of the bonds by the payee named therein, although they are also made payable to bearer, is, by the laws of Illinois, where the original contract was made, a prerequisite to pass the legal title and to authorize a suit by the holder in his own name. This precise question arose in Roberts *v.* Bolles, 101 U. S., 120, involving the validity of certain municipal bonds payable to a railroad company or bearer, and on which there appeared no assignment or indorsement by the company. Upon examination of the decisions of the Supreme Court of Illinois, we there reached the conclusion that, by the repeated adjudications of that learned tribunal, municipal bonds payable to bearer, or to some named person or bearer, were excepted from the rule announced in Hilborn *v.* Artus, 4 Ill.,

344, and Rossa *v.* Crist, 17 Ill., 350, in which it was, in effect, held that notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name.

Counsel in the present case insist that our ruling in Roberts *v.* Bolles resulted from a misapprehension of the settled course of decisions in the State court; and we are asked to reconsider the question in connection with some cases in that court to which our attention was not then called. Those specially relied on to establish the error of our conclusion in that case are Garvin *v.* Wiswall, 83 Ill., 217, and Turner *v.* P. & S. R. R. Co., 95 Id., 143.

The first of these cases related to a county order executed by a board of supervisors, directing the treasurer of the county, on a day named, to "pay to John Murphy or bearer" a certain sum "out of the funds appropriated for bounties to volunteers, with interest at the rate of eight per cent. per annum from this date, upon the presentation of the annexed coupons"—an instrument of writing not negotiable, in the sense of the law-merchant, so as to exclude defenses or evidence of invalidity, even when held by a *bona-fide* purchaser. (Wall *v.* County of Monroe, 103 U. S., 77.)

The case in 95 Illinois relates to a certificate of indebtedness issued by a receiver appointed in a suit against a railroad company, and which certificate, the State court expressly held, did not possess the qualities of negotiable or commercial paper. It also appears in that case that the certificate was made payable to a named person "or bearer," when the order of court, printed thereon, directed it to be made payable to such person "or order."

The language of those two cases must be construed in connection with the particular kind of instrument to which the court referred. While in each may be found general statements which seem to justify the position of counsel, we do not understand those cases to determine anything necessarily inconsistent with the conclusion reached in Roberts *v.* Bolles,

viz., that by the law of Illinois municipal bonds, whether payable to bearer or to some person or bearer, are negotiable by delivery, so that the holder, even in the courts of Illinois, can sue thereon in his own name, although they have not been previously assigned or indorsed by the named payee.

Notwithstanding the criticism by counsel of the opinion in Johnson *v.* County of Stark, 24 Ill., 93, we are not satisfied that the Supreme Court of Illinois has intended, in any subsequent case, to qualify what was there said by Mr. Justice Walker in reference to municipal bonds and coupons issued to railroad companies: "It seems to be the well-settled doctrine that State, county, city, and other bonds and public securities of this character are negotiable by delivery only, without indorsement, in the same manner as bank bills, especially when they are payable to bearer." In that case the coupon was not payable either to order or to bearer, but the promise was to pay the amount named "on this coupon." The court ruled that the holder of the coupon could sue and recover in his own name.

The bonds in suit, it will be observed, are payable at a bank in New York. According to the general rules of commercial law, as recognized in that State, the holder of negotiable securities, payable to a named person or bearer, whether they are indorsed or not by such payee, acquires by delivery merely the legal title and the consequent right to sue thereon in his own name. (3 Kent Comm., 78; Brush *v.* Reeves' Adm'rs, 3 Johns., 78; Dean *v.* Hall, 17 Wend., 214.) Whether the nature and extent of the rights acquired by the bank are determinable by the law of New York, the place of performance, or whether the general rule that a contract is to be expounded by the law of the place where it is to be executed, (6 Pet., 200; 13 Pet., 77; 1 How., 169,) can be applied to an Illinois municipal corporation whose bonds, without express legislative authority, have been made payable elsewhere than at its own treasury, (19 Ill., 406; 22 Id., 151; 24 Id., 91; 31 Id., 531; 68 Id., 535,) are questions which need not be now determined. It is sufficient in this case to say that the ground first alluded to, upon which

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the plaintiff denies the right of the bank, the holder for value of its bonds, to sue in its own name, cannot be maintained.

The judgment is affirmed.

AFFIRMED.

L. M. LINCOLN, LIVINGSTON CROUSE AND ISAAC CROUSE, HEIRS AT LAW OF W. W. CROUSE, DECEASED, LEONARD HOYTE, R. SHERBURN, ANTONIO DE SILVA, SAMUEL O'NESS, AND SAMUEL ONESTI v. IRA G. FRENCH.

May 6, 1882.

Where a party conveys land to trustees by a deed containing a provision that if a certain event did not happen in a certain time the deed should be void, and the event did not happen, and in fact became impossible, it will be presumed in a suit brought three years after such failure of the trust, in the absence of proof to the contrary, that a reconveyance had been made by the trustees to the grantor, but such presumption is only *prima facie* and not conclusive, and must yield on the production of contrary proof.

ERROR to the Circuit Court of the United States for the District of California.

This was an action for the possession of a tract of land containing three hundred and twenty acres, situated in the town of Sutter, county of Sacramento and State of California. The complaint is in the usual form for the recovery of land under the system of procedure which obtains in California. As originally filed in November, 1866, it embraced thirty-one defendants; but by amendments to the pleadings and other causes the number has since been reduced to seven. Various defenses were set up by them, which it is not necessary to state to understand the questions to be considered. It is enough to say that they were sufficient to put in issue the title of the plaintiff and his right of possession.

The case was first tried in 1867, before a jury, by whom a general verdict was rendered for the defendants; upon which judgment was entered in their favor. The question on the

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trial, upon which the case turned, related to the validity of a deed of the sheriff of the county, executed to one of the defendants upon a sale of the property for taxes. The Circuit Court held the deed valid and instructed the jury to find for the defendants. The case being brought here, the judgment was reversed and the cause remanded for a new trial, this court holding that the sale was invalid, as the sheriff had not conformed to provisions of the statute, in that he offered the whole property to the highest bidder instead of selling the smallest quantity which any purchaser would take and pay the judgment rendered for the taxes and costs. (French *v.* Edwards, 13 Wall., 506.)

The case was again tried in 1872, this time by the court, without the intervention of a jury, upon the stipulation of the parties. The court found as facts that on the 1st of March, 1862, Robert H. Vance was the owner in fee of the lands in controversy, and on that day conveyed the same to the plaintiff, Ira G. French; and that on the 9th of January, 1863, French and Vance, with several others, joined in a deed conveying the lands to Edward Martin and Francis E. Lynch—upon trust to sell the same in lots of such size and for such prices as should be directed by a committee of four persons, or a majority thereof, to be selected in a manner indicated; and to distribute the proceeds of the sales immediately upon their receipt, in specified proportions, to the several grantors and to a certain railroad company, thereafter to be organized, to construct and maintain a railroad connecting the town of Sutter with the Sacramento Valley Railroad, the portion of this company to be paid when the connecting road was completed. The deed provided that no conveyance should be made by the trustees until the railroad was commenced in good faith, and that the deed of trust itself should be void if the proposed railroad was not built within one year from its date, unless the iron for the same should be lost or detained on its transit; in which case the time for completing the road was to be extended to two years instead of one year.

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The court also found as facts that the contemplated railroad company was never incorporated, that the proposed road was never commenced, and that the defendants, who appeared in the action, were, at its commencement, in the exclusive adverse possession of the premises; and as conclusions of law (1) that the plaintiff, French, acquired title in fee to the premises in controversy by the deed from Vance on the 1st of March, 1862; and (2) that his title was conveyed by the deed to Martin & Lynch on the 9th of January, 1863, and did not revest on failure of the conditions mentioned in the deed without a re-entry for condition broken, or other act manifesting an intention to avoid the deed on that ground, but remained in the trustees at the commencement of the action; and that, therefore, the defendants were entitled to judgment in their favor. Judgment being entered, the case was again brought to this court, and was again reversed on the ground that a reconveyance from the trustees to French should have been presumed by the court below from the lapse of time after the deed of trust was made, and from the fact that the conditions upon which the trust was to be executed had never arisen, and had become impossible.

The case was tried a third time in October, 1878, before the court without a jury. Among other things, the court found the same facts which it found on the second trial as to the execution of the trust deed to Martin & Lynch, the non-incorporation of the contemplated railroad company mentioned in it, and the non-construction of the proposed railroad; and the further fact that the trustees never executed any instrument reconveying or purporting to reconvey to the plaintiff any part of the premises covered by the trust deed, either before or after this action was commenced. But construing the decision of this court as indicating that the presumption of reconveyance arising from the facts stated was indisputable and conclusive, it held that the presumption could not be overthrown by evidence that no such reconveyance was actually executed. It accordingly found that the title was in the

plaintiff from the presumed reconveyance from the trustees, and gave judgment in his favor. To review this judgment the case is again brought to this court.

J. H. McKune, *A. T. Britton*, and *J. H. McGowan*, for plaintiffs in error.

John Reynolds and *S. O. Houghton*, for defendant in error.

FIELD, J.—In giving its decision when the case was last here, this court was led into an error in the statement of a fact. It says in its opinion that the action was begun in November, 1872, more than eight years after the time limited when the trust deed to Martin & Lynch was to lose its efficacy, when in reality it was commenced in November, 1866, less than three years after the time mentioned, within which the road was to be completed. Although the duty to reconvey arose when by the terms of the trust deed the time had passed within which the work was to be done, and the conditions upon which the trust was to be executed had become impossible, a reconveyance was to be presumed only in the absence of proof to the contrary. Like other presumptions, it was sufficient to control the decision of the court if no rebutting testimony was produced. But all presumptions as to matters of fact capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown.

While in its opinion the court, speaking through Mr. Justice Swayne, expressed itself as being clear that the case as then presented was one in which a presumption of reconveyance was to be indulged, and quoted with approbation the language of Sir William Grant in such cases, that "what ought to have been done should be presumed to have been done," and that "when the purpose is answered for which the legal estate is conveyed it ought to be reconveyed," it added: "If it had been one of the facts found by the court below that the title

was still in the trustees, the case would have presented a different aspect. It is stated only as a conclusion of law arising upon the facts found." It is plain, therefore, that this court only considered that the conclusion of law of the lower court, that the title was still in the trustees, was not warranted by the facts found, and that the case would have been differently decided had what was thus stated as a conclusion of law been one of those facts. It was not the intention of this court to hold that the presumption was a conclusive one, not open upon a retrial to rebuttal, because it was considered to properly arise upon the facts then presented by the record. When the case went back upon our decision for further proceedings, (which, this being an action at law, were necessarily those of a new trial,) the fact as to a reconveyance was open to proof, and was not to be taken as conclusively established from the force of the presumption that it had been made. Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear presumptions disappear.

The fact having been established, against the presumption mentioned, that the trustees never reconveyed the premises, or any part thereof, to the plaintiff, the title remains in them, and with it the right of possession. Judgment should, therefore, have been ordered for the defendants. It follows that the judgment of the Circuit Court must be reversed and the cause be remanded with directions to enter judgment in their favor; and it is so ordered.

REVERSED.

VENABLE & SON v. GEORGE S. RICHARDS, COLLECTOR OF INTERNAL REVENUE.

May 8, 1882.

1. Section 643 of the Revised Statutes, providing for removal from State courts of civil suits against revenue officers, is not superseded by the act of March 3, 1875.

Opinion of the court.

2. The tax on snuff is thirty-two cents per pound. Granulated tobacco, whatever it may be, was not snuff within the meaning of the statute.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

W. P. Burwell, for plaintiffs in error.

S. F. Phillips, *Solicitor-General*, for defendant in error.

HARLAN, J.—Section 643 of the Revised Statutes provides, among other things, for the removal into the Circuit Court of the United States for the proper district, upon petition by defendant to that court, without bond, and without reference to the amount in dispute, of any civil suit, or criminal prosecution, "commenced in any State court against an officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of such revenue law." Similar provisions are to be found in the act of July 13, 1866, reducing internal taxation, and for other purposes, and in the act of March 2, 1833, providing for the collection of duties on imports. (14 Stat., p. 171, sec. 67; 4 Stat., p. 633, sec. 3.)

The present suit—commenced in one of the courts of the commonwealth of Virginia, and thence removed, in the mode prescribed by the above section, into the Circuit Court of the United States for the Eastern District of Virginia—is clearly embraced by the terms of that section. Its object is to recover from the defendant, Richards, certain sums, aggregating more than five thousand dollars, which, it is alleged, he, as a collector of internal revenue, illegally exacted and collected, *as taxes*,

upon snuff manufactured by the plaintiffs, Venable & Son. The court below denied a motion to remand the cause to the State court. Its action in that particular is now assailed upon the assumption that the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from the State courts, superseded section 643 of the Revised Statutes, at least as to all cases removable under the act of 1875. The present suit is undoubtedly one arising under the laws of the United States, and as the matter in dispute, exclusive of costs, exceeds the sum of five hundred dollars, it could, consistently with the language of the act of 1875, have been removed before or at the term at which it could have been first tried, upon petition filed in the State court, accompanied by the required bond. But it does not follow that a removal of suits described in section 643 of the Revised Statutes could not be effected in some other mode than that defined in the act of 1875. The latter statute neither in terms nor by necessary implication abrogates previous laws providing for the removal of causes from the State courts into the courts of the Union. It repeals only such acts and parts of acts as are in conflict with its provisions. We fail to perceive any necessary conflict between the two statutes. Section 643 provides for the removal of both civil and criminal prosecutions of a limited class, arising under the laws of the United States, without regard to the amount involved; while the act of 1875 provides for the removal of all civil suits arising under the laws of the United States, where the matter in dispute exceeds the sum or value of five hundred dollars. Certainly so much of the former as relates to criminal prosecutions is unaffected by the act of 1875. And the same thing may be said of civil suits of the class described in section 643, where the matter in dispute, exclusive of costs, is less than the sum of five hundred dollars. But looking at the policy which underlies all the legislation providing for the removal from State courts of civil suits against officers appointed under or acting by authority of any revenue law of the United States, we can-

not suppose that Congress intended to deny to such officers, when sued for amounts exceeding five hundred dollars, exclusive of costs, the benefit of the liberal provisions which are confessedly accorded to them when sued for less than that sum. "If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be." (State *v.* Stoll, 17 Wall., 431.) We are of opinion that effect will be given to the intention of Congress by holding, as we now do, that section 643 of the Revised Statutes, not being in conflict with the act of 1875, is in full force as to all cases embraced by its terms; and consequently that the act of 1875, so far as it embraces suits arising under the laws of the United States, does not preclude a removal of a suit of the class defined in section 643, in the mode prescribed in that section.

This brings us to a consideration of the case upon its merits. The amounts which plaintiffs claim were illegally exacted as taxes upon snuff manufactured by them were paid from August, 1872, to May, 1875, both inclusive. They were assessed upon snuff at the rate of thirty-two cents per pound for the whole period, and their contention is that that was in excess of the rate established by law.

We are of opinion that the snuff manufactured by plaintiffs was taxable at the rate of thirty-two cents per pound. A careful examination of section 61 of the act of July 20, 1868, section 31 of the act of June 6, 1872, section 3368 of the Revised Statutes, and section 2 of the act of March 3, 1875, will show that during the period in question the tax upon snuff of all descriptions, when prepared for use, and manufactured of tobacco or any substitute of tobacco, was thirty-two cents per pound. (15 Stat., 152, 153; 17 Stat., 249, 250; Rev. Stat., sec. 3368; 18 Stat., 339.) The only basis for a different construction of the statutes exists in the fact that the act of June 6, 1872, substituted for the third and fourth paragraphs of section 61 of the act of July 20, 1868, a single paragraph which,

among other things, prescribes a tax of twenty cents per pound upon granulated tobacco. The substituted paragraph was carried into the Revised Statutes and is the second paragraph of section 3368. The conclusion attempted to be drawn from these facts has no foundation whatever upon which to rest. The act of 1872 left untouched the same paragraph of section 61 of the act of 1868, which expressly provided that "upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes:

"On snuff manufactured of tobacco, or any substitute of tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, a tax of thirty-two cents per pound. And snuff flour when sold, or removed for use or consumption, shall be taxed as snuff, and shall be put up in packages and stamped in the same manner as snuff."

And this provision was reproduced in section 3368 of the Revised Statutes, of which the paragraph prescribing a tax of twenty cents on granulated tobacco is also a part. The plaintiffs concede that the article which was taxed in their hands was commonly known as snuff, but they insist that snuff is granulated tobacco within the meaning of the act of 1872 and of the Revised Statutes. If so, it results that while granulated tobacco was subject, since the passage of the act of 1872 and up to March 3, 1875, to a tax of twenty cents per pound, and by the act of the latter date to twenty-four cents per pound, there was in force during the same period another provision specifically taxing snuff manufactured of tobacco or any substitute for tobacco, of all descriptions, at the rate of thirty-two cents per pound. Any such construction of the statute is inadmissible. The bill of exceptions stated that there was no evidence to show that the term snuff was synonymous with granulated tobacco, and that while the plaintiffs' witnesses knew what was meant by snuff, they did not know what granulated tobacco was in the trade in Virginia, nor what the statute meant by that phrase. It will not, therefore, be ex-

Opinion of the court.

pected that this court will judicially know what granulated tobacco is, or in what respect, if in any, it resembles snuff. All that we decide is, that the article manufactured of tobacco, or any substitute for tobacco, known in the trade and prepared for use as snuff, is within the meaning of the statute snuff, upon which, when sold or removed for consumption or use, was imposed, during the period in question, a tax of thirty-two cents per pound.

The judgment is affirmed. AFFIRMED.

SAMUEL B. GORDON, EDWARD W. FOSTER, AND HENRY WATKINS v. JOHN G. BUTLER.

May 8, 1882.

1. Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value is more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance on it may produce.
2. Hence a written certificate as to the value of land supposed to contain a mine of sandstone, by which a party was induced to lend a sum of money on it as security, and which greatly exceeded the value of the land, when sold to satisfy the debt, is not actionable.

ERROR to the Circuit Court of the United States for the Northern District of New York.

Leslie W. Russell, for plaintiffs in error.

Harry Bingham and *A. X. Panser*, for defendant in error.

FIELD, J.—This was an action for alleged fraud upon the plaintiff in obtaining from him a loan of $10,000 upon insufficient security. The facts of the case, so far as necessary to present the questions involved for our consideration, are briefly as follows:

Near the town of Potsdam, in New York, there are sand-

stone quarries, situated on the west bank of Racket River. The land containing them, when the loan was made, was divided into lots, varying in size from seven to thirty-six acres. Previously to 1873 the quarries, although generally supposed to consist of stone valuable for building and other purposes, had not been opened sufficiently to show their extent and value. A quarry similar in external appearance, situated on the river below and adjoining them, called the Parmeter quarry, had been worked for thirty or forty years, and furnished stone of a valuable quality in large quantities. For some years prior to 1872 the defendant, Gordon, a resident of Potsdam, had been assiduously trying to get possession of the quarries, in the belief that on development they would prove valuable, like the Parmeter quarry. His letters to Butler, the plaintiff, written at the time, indicated a confident belief that a fortune was to be made out of them, and he invested in them whatever means he could raise.

The plaintiff, prior to 1872, had frequently visited Potsdam, where he became acquainted with Gordon, a lawyer in practice there, and often employed him professionally. During these visits he learned something of the quarries, and that Gordon desired to obtain possession of and develop them. In that year there was much correspondence between them on the subject. Gordon expressed a strong conviction that the stone would be very valuable and find a ready market, and stated what he had heard of the buildings on which it had been used and of those for which it would probably be wanted. He desired to organize a stock company to work the quarries, and to have the plaintiff join in the enterprise. Failing to secure his co-operation, and being advised by him that he had better work the quarries himself, Gordon applied for a loan for that purpose. After much correspondence and negotiation the plaintiff promised to loan him $10,000, to be secured by mortgage on some of the lots, and advised him against investing a larger sum in them. The plaintiff, as is manifest from the correspondence, was fully aware at the time of the slightly developed con-

dition of the property; but an estimate of its probable value was furnished by the following certificate obtained by Gordon from the defendants Watkins and Foster, well-known gentlemen of the place, and sent to him:

"Each of the undersigned hereby certifies that he is and has been for more than twenty years last past a resident of Potsdam, St. Lawrence county, New York, and acquainted with the sandstone quarries south of Potsdam village; that he is acquainted with the quarry lots there owned by S. B. Gordon, and situate on the westerly shore of Racket River; that said lots are roughly represented on the annexed diagram; have on them the buildings, and in his best judgment contain the quantity of land and are worth the sums severally below cited, to wit:

"No. 1—Falls lot	about	8	acres, worth	$8,000
2—Orchard lot	"	4	" "	5,000
3—Cox "	"	16	" "	8,000
4—Hicks "	"	15	" "	5,000
5—Meacham " house and barn	"	7	" "	5,000
6—Hale "	"	10	" "	1,000
7—Parmeter lot, two houses and barns	"	17	" "	8,000
8—Train lot	"	26	" "	8,000
Total, 8 lots.		103		$48,000

"Dated Potsdam, Dec. 12, 1872.

"H. WATKINS.
"E. W. FOSTER."

No oral representations on the subject were made to the plaintiff by Watkins or Foster. Their connection with the loan consisted merely in furnishing this certificate at the request of Gordon. The loan was made on the first of the following January, and a mortgage taken as security for it upon four of the lots mentioned in the certificate, the aggregate value of which, as there stated, being $26,000. Watkins and Foster were at the time interested in the proposed enterprise; and their estimate of value was placed upon the lots not as agri-

cultural lands, but as lands containing sandstone quarries not yet opened.

After receiving the loan Gordon proceeded to open the quarries, and his operations had not progressed far when the financial crisis of 1873 came, and in it his enterprise was engulfed. The work on the quarries was stopped, and the value of the property rapidly depreciated. The mortgage to the plaintiff contained a clause declaring that the whole amount of the loan should at once become due if the interest was not punctually paid. Taking advantage of this clause, he commenced proceedings to foreclose the mortgage, and pressed them to a decree, under which the premises were sold and bid in by him for the sum of $1,500. He then commenced the present action against Gordon, who had obtained the loan, and Watkins and Foster, who had given the certificate as to the value of the property, to recover damages for the loss sustained by him. In his complaint he alleges that these parties conspired to defraud him by obtaining the loan upon a false and fraudulent certificate as to the value of the property.

The defendants pleaded the general issue. On the trial the plaintiff produced the correspondence between him and Gordon which resulted in the loan. He also offered the testimony of geologists, experts, and laborers as to the probable character and value of the material in the quarries. The whole, including the correspondence, covers many pages of the record, but its substance and purport, so far as it is at all material, we have stated. When it was closed the defendants requested the court to direct the jury to find for them on several grounds, and, among others, that upon the whole proof no cause of action had been established against them. The court refused to give this direction, and an exception was taken. Testimony was then produced by the defendants, and, after instructions from the court, the case was submitted to the jury, who found for the plaintiff.

We do not deem it important to comment upon this testimony, or to notice the rulings of the court upon matters which

were objected to, nor upon its instructions to the jury. It is enough to observe that if the testimony did not weaken it did not strengthen the case against the defendants. The question then is whether, upon the proof furnished by the plaintiff, a cause of action was established against the defendants; for if not, the motion to direct the jury to find in their favor should have been granted. Upon this question we have no doubt. The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a false and fraudulent certificate of valuation of the property given as security for the loan. The certificate of Watkins and Foster is that, *in the best judgment* of each, the lots were worth the sums severally stated. To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had knowledge at the time that the value of the property was materially less than their estimate. And from the nature of the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it, as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. How could an overestimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development

may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value.

The case of Holbrook v. Connor, which arose in the Supreme Court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the Supreme Court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. (60 Maine, 578.)

Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.

For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined.

Syllabus.

Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie. But to this class the present case does not belong. It falls within the class first mentioned.

It follows from these views that the court below should have directed the jury, upon the close of the plaintiff's testimony, to find a verdict for the defendants; for, from the nature of the subject in relation to which the certificate was given, the estimate of value was nothing more than a conjectural opinion, which, whether true or false, constituted no legal cause of complaint.

The judgment of the court below must therefore be reversed and the cause remanded for a new trial; and it is so ordered.

REVERSED.

JAMES W. HARVEY AND JAMES LIVESEY v. THE UNITED STATES.

May 8, 1882.

1. The contract of Harvey & Livesey with the United States to build a bridge at Rock Island, Illinois, should be construed in connection with the advertisement calling for bids and the bids; and so construed it was the duty of the government, and not of the contractors, to build the necessary coffer-dams.
2. The special act of Congress for their relief passed August 14, 1876, does not limit the equitable jurisdiction of the Court of Claims thereby conferred to the mere consideration of claims for labor done and materials furnished, but authorized it to adjust the accounts between the parties for all demands growing out of the contract.
3. Where equitable jurisdiction is conferred in a special case by a special act, no statement of facts on appeal is necessary, section 707 of the Revised Statutes of the United States not applying to such cases.

APPEAL from the Court of Claims.

Enoch Totten, for appellants.

Solicitor-General Phillips and *Assistant Attorney-General Simons*, for appellees.

Opinion of the court.

BLATCHFORD, J.—On the 12th of May, 1869, General Rodman, in command of the United States arsenal at Rock Island, Illinois, caused to be published the following advertisement, in pursuance of law:

"*Proposals for Bridge Masonry.*

"Sealed proposals will be received at this arsenal up to 10 o'clock A. M., on the 25th day of May, 1869, for the construction of the piers and abutments of the railroad and wagon-road bridge to be built to connect the island of Rock Island with the city of Davenport. It is proposed to build, say, five common piers, one draw-pier, and two abutments. The stone and cement required for the work will be furnished on railroad cars, on arsenal switch, near the island end of the proposed bridge, and the sand required for the cement will be furnished by the United States at or near the same point. All the masonry must be of the best quality of bridge masonry, the stones in each course must be well banded, and each course well secured by dowels to the course below under cut-water and at lower end of piers, and the foundation courses must be fairly bedded and well secured to the rock-bed of the river, the work as it progresses being subject to the inspection and approval of the commanding officer of the arsenal, or such other officer or person as may be designated by proper authority. Detailed information with regard to the general form and dimensions of the piers and abutments, and a profile of bed of river, can be obtained by personal application at the arsenal. The total amount of masonry is estimated at about 10,000 cubic yards. All the piers and abutments will be required to be completed prior to the 1st day of December, 1869. Parties making bids will state the price per cubic yard of solid masonry at which they are willing to complete the work, the United States furnishing the stone, cement, and sand, as above stipulated, and nothing more. They will also make a bid stating separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing the stone, cement, and sand, as above, and the price at which they will agree to put in the necessary coffer-dams

with their protections. Proposals will be indorsed 'Proposals for Bridge Masonry,' and addressed to the undersigned. The United States reserves the right to reject any bid not deemed satisfactory.

"T. J. RODMAN,

"*Lt.-Col. and Bvt. Brig.-Gen. U. S. A., Commanding.*"

The appellants put in the following proposal:

"ROCK ISLAND, *May* 25, 1869.

"We propose to build the masonry of piers and abutments of the Rock Island bridge, as per annexed advertisement:

Small piers and abutments, per yard $11 00
Draw-pier, per yard 13 00

"HARVEY & LIVESEY,
"Madison, Wisconsin."

The only other proposal put in was one by Reynolds, Saulpaugh & Co., as follows:

"ROCK ISLAND, ILL., *May* 25, 1869.

"Brig.-Gen'l T. J. RODMAN, *Com'd'g Rock Island Arsenal.*

"SIR: We respectfully propose to build your piers and abutments for the rail and wagon road bridge between the island of Rock Island and the city of Davenport, in accordance with the terms of your advertisement of May 12, 1869, at prices as follows:

"Solid masonry at $19.10 per cubic yard in the work complete, the United States furnishing the stone, cement, and sand, as stipulated, and nothing more. This price is based on 10,000 cubic yards of masonry in the work when completed. Or, as per your second plan, at prices as follows:

"Solid masonry at $12.70 per cubic yard in the work complete, the United States furnishing the stone, cement, and sand, as above, and build the coffer-dams at prices as follows:

"For pier No. 1, dam 18 feet high	$7,800
"For " 2, " 15 "	34,900
"For " 3, " 13 "	6,000
"For " 4, 5, & 6, 12 "	15,000
	$63,700

"The above prices for dams include the protections to the same, complete. Respectfully yours,

"REYNOLDS, SAULPAUGH & Co."

The bid of the appellants was accepted. A contract was then drawn by a clerk of General Rodman. A rough draft of it was submitted to the appellants, and, on their returning it as satisfactory, the engrossed copies were prepared for signature, and the contracts were executed and interchanged, bearing date June 1, 1869. The following are the provisions of the contract which are material to this case: "The parties of the first part do hereby contract and engage with the said United States to construct the piers and abutments for the new rail and wagon bridge, to be built to connect the island of Rock Island with the city of Davenport, in accordance with such plans and specifications as may be fixed by proper authority acting for the United States; the United States to furnish stone, cement, sand, and all necessary templets required for the work, and nothing more; the stone and cement to be delivered in cars at the government switch on the island near the site of the work. * * * * The character of the work to be daily inspected as it progresses by such officer or other person as the commanding officer of the Rock Island arsenal, or other authority appointed by the United States, may designate; such inspector to have full authority to give any directions with regard to the character or manner of conducting the work. The whole work to be completed prior to the first day of December next, provided that the stone shall be delivered at the rate of two thousand cubic yards per month; and in case of any failure on the part of the United States to deliver this amount of stone, then the work to be completed as soon after the first day of December next as practicable. * * * * Payment in such funds as the Treasury Department may provide, at the rate of thirteen (13) dollars per cubic yard for all masonry in the draw-pier, and at the rate of eleven (11) dollars per cubic yard for all other masonry. * * * * It is further stipulated and agreed that if any default shall be made by

the parties of the first part in the performance of their work specified in this contract, of the quality and at the times and places therein provided, that then, in that case, the United States shall have the right to take entire and exclusive charge of the work, and to complete it in accordance with the conditions prescribed by this contract, charging us with the entire cost of completing it, and crediting us with the amount per cubic yard heretofore stipulated to be paid us for the completing of the work."

On the 14th of December, 1870, the appellants filed a petition in the Court of Claims praying a judgment against the United States for $200,400. The petition set forth that the contract was one for doing the masonry-work in and about the construction of the piers and abutments; that proposals were invited for said work, and also separate proposals for putting in the necessary coffer-dams and their protections, but the petitioners bid only for said masonry work in the construction of said piers and abutments; and that their bid, being the lowest one for said masonry-work, was accepted, and the contract was awarded thereon. The petition made the following claims, by items, against the United States: 1. For damages incurred by reason of the unreasonable delay caused by defendants from June 7, 1869, to September 4, 1869, $25,000; 2. For putting in coffer-dams and protections, for pumping the water therefrom, and for preparing the beds for the piers and abutments, $75,000; 3. For loss of profits incurred by the unlawful reduction of the dimensions of the piers and abutments, $33,600; 4. For increase in the cost of the work, by having been compelled to do it in cold weather, $15,000; 5. For constructing 4,400 cubic yards of masonry, at, say, $12 per yard, $52,800; 6. For loss caused by neglect of defendants to furnish materials and locate piers and abutments, whereby the plaintiffs, their workmen and tools, were kept idle, $15,000; 7. For loss of machinery, vessels, and tools, caused by the ejectment of the plaintiffs from the work, $25,000; 8. For dressing coping and corners of abutments, and dressing noses of piers under water, not re-

quired by contract, $5,000. This made a total of $246,400, on which $46,000 was credited as paid, leaving a balance of $200,400. The petition contained allegations bearing upon each one of the eight items claimed, but it is not necessary here to refer to any but those in respect to items 2 and 3, which allegations were as follows: "That about the 13th day of September, 1869, the United States having furnished materials sufficient to commence the construction of said piers and abutments, the petitioners requested the agent of the defendants to put in, or cause to be put in, the necessary coffer-dams and to pump the water therefrom, and prepare beds for said piers and abutments, to enable petitioners to proceed with the performance of their contract. But the United States refused to put in such coffer-dams and pump the water therefrom, and refused to prepare said beds, pretending that petitioners were bound, under said contract, to put in said coffer-dams. The petitioners thereupon protested against such wrongful construction of said contract, but, at the special request of the defendants, and relying upon the good faith of the United States, they undertook to and did put in the necessary coffer-dams and protections, and pump the water therefrom, and did prepare the beds for said piers and abutments. That the labor and materials expended in putting in said coffer-dams and protections, and pumping water and preparing beds as aforesaid, was reasonably worth, and they are entitled to recover for the same from the United States, the sum of seventy-five thousand dollars. That they were informed by the United States, prior to the making of said proposal, that the draw-pier would be four hundred and seventy-four feet long and fifty-six feet wide, and that the five common piers would be each seventy-four feet long and fourteen feet wide, and that, with the abutments, there would not be less than ten thousand cubic yards of masonry work, and that petitioners based their estimates for said work upon such information, and made their said proposal in the belief that said piers and abutments would be constructed according to such dimensions. But they allege that the defendants, on or about

the 22d day of July, 1869, transferred the supervision of said work from the ordnance bureau to the bureau of engineers, and that the petitioners, although they were at all times ready and anxious to proceed with said work, were kept waiting from the 7th day of June, 1869, until September 7, 1869, as aforesaid, and that on or about the said 7th day of September, 1869, the defendants marked out the location for one pier and one abutment only, and wrongfully reduced the dimensions of all the said piers and abutments, so that instead of measuring ten thousand cubic yards they measured only about six thousand five hundred; and that by reason of said reduction by said defendants in the dimensions of said piers and abutments the petitioners have been damaged in the full sum of thirty-three thousand six hundred dollars."

Subsequently the petitioners amended their petition as to item 5 so as to make it read as follows: "For handling, cutting, preparing, and setting stone for and in the piers and abutments, $82,000." The United States by answer denied every allegation in the petition, and set up a counter-claim for $33,681.35, alleging that, under the contract, the petitioners being in default, the United States took charge of the work and completed it, and charged the petitioners with the entire cost of completing it, $142,457.17, and credited them with the amount per cubic yard stipulated in the contract to be paid them for completing the work, $108,775.82, leaving a balance due to the United States from the petitioners of $33,681.35.

Proofs were taken and the case was heard by the Court of Claims. It awarded to the petitioners $20,068 in respect of items 1 and 6. As to item 2, the court found that it was necessary, in order to the laying of the abutments and piers, that a coffer-dam should be built for each abutment and pier, and the water pumped out of it, and the bed of the river prepared for laying the masonry of the abutment or pier thereon; that without such coffer-dams it was impracticable to construct any of the abutments or piers; that the petitioners, on the 13th of September, 1869, requested the United States to forthwith

construct the requisite coffer-dams, exhaust the water therefrom, and prepare the bed for the piers and abutments where necessary for the commencement of the work; that the United States on the next day refused so to do, on the ground that, under the contract, it was the business of the petitioners to do the work; that on the next day the petitioners protested against such refusal, and notified the United States that they should proceed at once to build the dams, pump the water therefrom, and prepare the beds, and should hold the United States for the payment of the costs and expenses of the same; that on the next day General Warren, in charge of the construction of the bridge, consented, in order not to delay the work, to its going on until the matter could be referred to the Attorney-General of the United States, but stated that in such consent it must be considered that nothing was admitted in favor of the claim of the petitioners to their interpretation of the contract; that immediately upon such refusal of the United States the petitioners proceeded to build the requisite coffer-dams, and that all that was required in that respect while the work was in their hands was done by them. But the court found as a conclusion of law that the contract did not require the United States, but required the petitioners, to do the work named in item 2. As to item 3, the court found that about the 17th of July, 1869, General Rodman was relieved from the charge of the construction of the bridge by General Warren, of the corps of engineers; that General Warren, on the 22d of August, 1869, caused notice to be given to the petitioners that the position of the abutment and first pier of the bridge on the Iowa side was determined and marked, ready for them to commence their construction; that, when proposals were so invited by advertisement, General Rodman had prepared certain plans of the bridge, intended to show the general forms and dimensions of the piers and abutments, and a profile of the bed of the river; that those plans were seen and inspected by the petitioners before they sent in their said proposal; that the dimensions of the piers of the bridge which

were fixed upon on the 22d of August, 1869, and those which were, after that date, from time to time fixed upon, were less than the dimensions indicated in the plans prepared by General Rodman and shown to the petitioners before they made their said proposal; but that there was no reduction of the sizes which were fixed upon on the last-named day, nor was there any reduction of the sizes thereafter adopted. The court found, however, as a conclusion of law, that the reduction made in the dimensions of the piers and abutments of the bridge, as originally projected, was not, by the legal construction of the contract, wrongful to the petitioners. As to item 4, the court found that the petitioners were not subjected to any increase in the cost of the work by having been compelled to do it in cold weather. The court also found that on the 6th of October, 1870, the petitioners were notified in writing, by the officer in charge of the work on the bridge, that in consequence of complaints which had reached the chief of engineers of the United States army of the tardy progress of the work on the masonry of the bridge, the said officer had been required to take suitable and efficient measures to expedite the work, and that, in view of that requirement, he would take the work as it stood and carry it on under the provision of the contract which contemplated such a change; that on the next day the petitioners, in writing, refused to give up the work, whereupon, on that day, the said officer notified them, in writing, that he would on the next day take possession of the work for the government, which he did, against the assent and protest of the petitioners; and that thenceforward the work was prosecuted by the officers of the government. In regard to item 5 as amended, the court found that the petitioners, before their ejectment from the work, had done work upon and for the bridge, under the contract, to the amount of $76,344.47, and had been paid on account of said work $54,105.98, leaving due to them, under item 5, $22,238.49. As to item 7, the court found that the petitioners did not sustain any damage by reason of the idleness of their tools, machinery, and

vessels after October 8, 1870, which they would not have sustained had they on that day completed their work under the contract, or which was not incident to the termination at any time of their work under the contract. As to item 8, the court found that the petitioners were paid in full for all the extra work they did on or about the abutments and piers of the bridge. The court awarded to the petitioners $42,306,49, being $20,068 on account of items 1 and 6, and $22,238.49 on account of item 5, and rejected their claim under items 2, 3, 4, 7, and 8.

The opinion of the Court of Claims in deciding the case is found in 8 Court of Claims Reports, 501. From that it appears that, in regard to item 2, the court held that neither the advertisement nor the bid could be invoked to interpret the contract; and that the proper construction of the contract was that it was the duty of the petitioners to build the coffer-dams, pump the water therefrom, and prepare the bed of the river for the piers and abutments which they were bound to construct. In regard to item 3, the court held that under the contract the officer in charge had the power to make the alterations in the dimensions of the piers which made the profits to the petitioners less.

The Court of Claims having no equitable jurisdiction to reform a contract, the petitioners acquiesced in the decision made so far as not to take an appeal to this court, and to receive payment from the United States of the amount of the judgment for $42,306.49, but they applied to Congress and procured the passage of an act, approved August 14, 1876, (19 U. S. Stat. at Large, 490,) which provides as follows: "That the claim of James W. Harvey and James Livesey for alleged labor done and materials furnished under their contract with the United States for the building of the masonry-work for the piers and abutments of the bridge across the Mississippi River from Rock Island to Davenport, Iowa, bearing date June first, eighteen hundred and sixty-nine, be, and the same is hereby, referred to the Court of Claims for hearing and adjudication;

and to that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the accounts between said claimants and the United States as a court of equity jurisdiction; and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require."

On the 30th of August, 1876, the petitioners filed in the Court of Claims a petition, which recites the former proceedings, and the judgment, and its payment, and the contents of the said act of Congress, and then proceeds as follows: "The plaintiffs allege that there is still justly due to them from the United States a large sum of money for damages and for work and materials, and, in addition to the charges made in the aforesaid original petition, they say that connected with the pivot-pier of said bridge there were large walls of stone masonry and crib-work, connecting the upper and lower rests of the pivot-pier with the pivot thereof, which were constructed mainly of irregular or riprap masonry, and that, to finish the abutment on the Iowa shore, wing-walls, constructed of 'riprap' masonry, were necessary, all of which was a part of the plaintiffs' work under the contract; that, this work being cheap and easily done, the officers in charge of said work in behalf of the United States refused to permit the plaintiffs to do it, and employed laborers and constructed the same for the United States, and thus unjustly and unlawfully deprived the plaintiffs of large profits which they otherwise would have made. They allege that they could have made on the said work the sum of $51,000 in profits. The plaintiffs aver that there is justly and equitably due to them from the United States on account of the premises, and in addition to the amount already paid to them, the sum of $239,600, with interest, according to the following specifications, to wit: 1. For labor done and materials furnished by the plaintiffs in constructing the coffer-dams, and in performing the work necessarily connected therewith and preliminary to the masonry-

work for said piers and abutments, $75,000; 2. For loss and damages resulting to the claimants in consequence of the reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract, $33,600; 3. For loss of machinery, vessels, and tools, caused by taking from the plaintiffs the work under their contract, $25,000; 4. For extra work, dressing coping and corners of abutments, and dressing noses of piers under water, (this work not being required by the contract,) $5,000; 5. For the profits they could have made had they been permitted to build the cross-walls and crib-work connecting the upper and lower rests with the pivot, (part of the contract,) $48,000; 6. For profits they might have made had they been permitted to construct the wing-walls for the Iowa shore abutment, (these walls were 'riprap,' and a part of the work under the contract, out of which liberal profits have been made; the agents of the United States performed the work,) $3,000; 7. For profits they might have made had they been permitted to complete the work according to the intention of the parties and the terms of the contract, in addition to the foregoing charges, $50,000; 8. For interest on the amount found due to the claimants on an equitable adjustment of accounts between the parties, from October 6, 1870, until the date of the judgment of this court, at the rate of *six per centum per annum*. The petitioners therefore claim judgment against the United States for the sum of $239,600, with interest thereon at *six per centum per annum*, and they pray the court to reform the said contract, if the same be necessary, so as to make the same conform to the intention of the parties and to be in consonance with justice and equity, and for such other and further or general relief as in justice and right they may be entitled to have." The United States demurred to this petition on the ground that it did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer and gave leave to the petitioners to amend the petition. (12 Court of Claims Rep., 141.) One of the grounds on which the court proceeded was,

that so far as the demands covered by the new petition are legal demands, under the contract, enforcible in a suit at law founded on the contract, such demands cannot, under the special act of Congress, come under the cognizance of the court. This view is, in our judgment, correct. The court further held that there were no averments in the petition showing a title to equitable relief founded on the view that the written contract did not set forth the true agreement, and no facts alleged showing a right to recover on the reformed agreement. It was held that the court was to proceed simply "as a court of equity jurisdiction," and that the accounts which it could adjust and the relief which it could give must be limited to matters which, because of its inability to sit as a court of equity, it could not and did not before determine.

A comparison of the new petition with the first petition shows that items 1, 2, 3, and 4 in the new petition are severally reproductions of items 2, 3, 7, and 8 of the first petition; that items 5, 6, 7, and 8 in the new petition are entirely new; and that items 1, 4, 5, and 6 in the first petition are not reproduced in the new petition, an award having been made in the judgment in respect of items 1, 5, and 6 in the first petition, and item 4 therein being abandoned.

The petitioners proceeded, under the leave granted, to amend their petition in equity, by adding thereto the following allegations: "The contract mentioned in the original petition in this cause was intended to carry out and execute the specifications and agreements contained in a certain advertisement or invitations for proposals for constructing the piers and abutments of the said bridge, published by the defendants, and in a bid made in pursuance thereof by the plaintiffs. The agents of the United States, by said advertisement, requested the persons bidding in pursuance thereof to state (1) the price per cubic yard of solid masonry at which they were willing to complete the work; (2) the price per cubic yard of solid masonry at which they were willing to build the piers and abutments; and (3) the price at which they were willing to put in the neces-

sary coffer-dams and protections. The said invitation for proposals also apprised the bidders that detailed information as to the general form and dimensions of the piers and abutments and a profile of the bed of the river would be exhibited to them at the arsenal. In pursuance of that part of the said invitation which referred to the work of building the solid masonry of the piers and abutments, and after having first obtained from the defendants' agents detailed information touching the form and dimensions of the proposed piers and abutments, and after having examined the profile of the bed of the river exhibited by the defendants, the plaintiffs, on the 25th day of May, 1869, submitted to the proper officers of the United States a proposal in writing, whereby they offered to build [only] the masonry of the said piers and abutments, upon the terms following, to wit, the small piers and abutments at and for the sum of eleven dollars per yard, and the draw-pier at and for the sum of thirteen dollars per yard. The said proposal was accepted by the defendants, and the said contract in the original petition described was prepared in the office of the agent of the United States, by a clerk therein employed, but, in consequence of accident and mistake, the said contract was so drawn as to depart from the intention of the parties and from the terms and specifications in said invitation and proposal contained. Instead of requiring the plaintiffs to perform the labor and furnish the materials contemplated by the said invitation and proposal and in the manner specified therein, the language employed in said contract inequitably required the plaintiffs 'to construct the said piers and abutments in accordance with such plans and specifications as may [might] be fixed by proper authority acting for the United States.' The plaintiffs did not discover the peculiar language of the said contract until long after the work had been in progress, nor did they ever believe that they were bound by said contract to do any more work, or furnish any more materials, or that they were obliged to perform the work in any other manner, than as specified and contemplated in the said invitation and proposal, until the judgment of this court

compelled them to submit to said construction. When the officers of the defendants first claimed for the said contract the strict construction aforesaid, the plaintiffs protested, and refused to proceed any further with the work, but the said officers by promises (which they never kept) induced the plaintiffs to go on, notwithstanding the dispute, and they accordingly did proceed, and they were required by the agents of the United States to construct the coffer-dams and do all other work and furnish all other materials preliminary to building the solid masonry for said piers and abutments, and to construct said piers and abutments on very materially different plans and in different localities from those contemplated by the parties at the time of making said proposal, and said piers and abutments so built were, in consequence of the alterations in the form and locality thereof, much more expensive to the plaintiffs, for which no allowance has ever been made to them. Through the error and mistake aforesaid the defendants were given an unfair and unconscionable advantage over the plaintiffs, and have obtained the materials, labor, and skill of the plaintiffs, of great value, and have paid nothing for them. The labor performed and the materials furnished by the plaintiffs for the United States in putting in said coffer-dams and furnishing the other materials and performing the other work preliminary to building the masonry of said piers and abutments were reasonably worth the sum of seventy-five thousand dollars; and the work done and materials furnished by them for the United States in and about the masonry of said piers and abutments were reasonably worth, in consequence of the change of locality and of plans and specifications unlawfully made by the defendants under the erroneous provisions of said contract, the sum of thirty-three thousand and six hundred dollars over and above the sum which the plaintiffs have already been paid therefor. The plaintiffs, therefore, pray that the said contract may be so reformed as to correspond with the intention of the parties, and that they may be paid for the labor and materials by them performed and furnished upon the said bridge. They further pray

that they may have such other and further relief, and be paid such other and further sums of money, as may be agreeable to equity and good conscience, and as the provisions of said act of Congress may authorize and require."

By leave of the court the petitioners filed a second amendment to the petition in equity, stating as follows, in addition to what was contained in said petition and the first amendment thereto:

"First. By the terms of the advertisement inviting proposals, the proposal of the plaintiffs and the acceptance thereof by the defendants, as alleged in the original petition herein and the amendment thereto, a preliminary agreement was made between the plaintiffs and the defendants, by which the plaintiffs agreed to build the masonry-work of the piers and abutments of the said bridge at Rock Island for the prices stated in the said original petition and the amendment thereto, and according to certain plans showing the general form and dimensions of the piers and abutments and their locations in the river, and according to a profile showing the bed of the river at the place where the work was to be done, which plans and profile were, before the making of the proposal, exhibited by the defendants to the plaintiffs, and were by them inspected, to enable them to prepare their estimates for making their said proposal; and the United States thereby agreed to furnish the stone, cement, and sand for said masonry, and also to erect and put in the necessary coffer-dams, with their protections, and to perform the preliminary work necessary to enable the plaintiffs to build the said masonry-work according to their said proposal and according to said general plans, and at the location in the river indicated by said plans and profile.

"Second. For the purpose and with the intent and design of carrying into effect said agreement thus made as aforesaid, a formal contract was prepared by officers of the United States, which was afterwards signed and delivered by both parties; but by accident and mistake the said contract did not conform to the terms of said previous agreement, nor to the

intention of the parties. The said contract was, by such accident and mistake, so drawn as to impose upon the plaintiffs the burden and expense of constructing and putting in the necessary coffer-dams with their protections, and of performing the preliminary work connected therewith, instead of requiring the United States to put in said coffer-dams and perform said preliminary work, as had been previously agreed upon and as was intended by the parties. The cost of constructing and putting in said coffer-dams with their protections and doing the preliminary work connected therewith was as great, if not greater, than the cost of building the masonry-work, and in consequence of the said accident and mistake the United States obtained an unconscionable advantage over the defendants, and compelled them to do work and furnish materials which they never intended to do, and for one-half the compensation the said work and materials were really worth. And the said contract, through accident and mistake, was so drawn as to require the plaintiffs to build the said piers and abutments in accordance with such plans and specifications as might be fixed by the officers of the United States, instead of requiring the United States to provide plans, and the plaintiffs to do their work, according to the general plans and profile exhibited to the plaintiffs as aforesaid, and at the location in the river agreed upon, as was the intention of the parties and as had been previously agreed upon by the parties. And the defendants, through said accident and mistake, have obtained an inequitable and unconscionable advantage over the plaintiffs, and in the construction of said bridge changed its locality further down the river and into deep water, and reduced the dimensions of the piers and abutments as prescribed by said original plans in such a manner as to preserve the cut-stone or expensive portion of the work, and to greatly reduce the quantity of rough, inexpensive work, through which alone profit could be derived by the plaintiffs, and thereby inflicted great injury upon the plaintiffs. The petitioners submit to the court that they are entitled to have said contract reformed so

as to make it conform to the intention and to the agreement of the parties, as expressed in the said invitation for proposals and the bid of the plaintiffs submitted in response thereto, and the acceptance thereof by the defendants, and to have the same judgment and relief as to the said coffer-dams and the work of constructing the piers and abutments as if the said formal contract had conformed to the said preliminary agreement and had contained the necessary provisions requiring the defendants to construct and put in the necessary coffer-dams and to perform the preliminary work connected therewith, and so as to conform in all things, in reference to the construction of the said bridge and piers and abutments, to the said original and general plans of said bridge, and to the profile of said river bed, and to the location thereby indicated. And the petitioners claim such other and further relief in the premises as their case may require and as may be authorized by the terms of the said act of Congress passed for their relief."

The United States, by answer, denied all the allegations of the petition and the amendments. The evidence in the first case was used as evidence in the second case, and no new evidence was taken. The court entered a general finding in favor of the defendants and dismissed the petition. From the decree of dismissal the petitioners have appealed to this court.

The reasons assigned for that decree are contained in the opinion of the Court of Claims, which is a part of the record, and is also reported in 13 Court of Claims Reports, 322. The court says that because of the decision on the demurrer it regards the present proceedings as relating only to the claims for the cost of the coffer-dams and for the loss of profits resulting from the reduction of the dimensions of the piers and abutments, being items 1 and 2 in the new petition. In regard to item 1, the decision is that the petitioners have not shown that the written contract does not express the intent of both parties as to the coffer-dams; and that even if the court were satisfied that the petitioners executed the contract in mistake of their rights, there is no evidence that the defendants shared

the mistake. In regard to item 2, the decision is that the court would be disposed to regard the case on the facts as one for equitable interposition for the purpose of further inquiry and the ascertainment of the rights of the parties in equity, if it had jurisdiction; but that the statute does not authorize it to entertain those considerations, because in these proceedings it can hear and determine only claims for labor done and materials furnished by the plaintiffs under their contracts with the defendants.

In regard to the coffer-dams, it seems clear to us that the ruling of the Court of Claims was erroneous. The advertisement begins by inviting proposals for the construction of the piers and abutments of the bridge. Standing alone this would involve proposals to make coffer-dams and do and furnish everything else necessary to finished work. But this is qualified by what follows. The advertisement goes on to say that parties making bids will state (1) the price per cubic yard of solid masonry at which they are willing "to complete the work," the United States furnishing the stone, cement, and sand, "and nothing more." "To complete the work" there means to construct the piers and abutments complete, including the making of coffer-dams and doing and furnishing everything necessary for completed work, except furnishing stone, cement, and sand, the United States furnishing those and furnishing nothing more. Then parties making bids are "also" to make a bid stating (2) separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing stone, cement, and sand; and "also" to make a bid stating (3) separately the price at which they will agree to put in the necessary coffer-dams, with their protections. Here are three distinct classes of bids: bid 1 for the whole work, including all that is embraced in the work specified in bids 2 and 3; bid 2 for a part of the whole work specified in bid 1 and excluding what is embraced in bid 3; and bid 3 for another part of the whole work specified in bid 1 and excluding what is embraced in bid

2. There is no implication in the advertisement from the use of the word "also," or from any other language, that a bidder could not make bid 2 or bid 3 unless he likewise put in a bid for bid 1; or that he could not bid for the specified parts of the work unless he should bid for the whole complete. The appellants did not make a bid for the work complete, or say in their bid that they were willing to complete the work. They bid only under bid 2. They stated separately, in their bid, the price per yard at which they would build the masonry of the piers and abutments. They excluded bid 3 and the coffer-dams, and they excluded bid 1 and the coffer-dams in it. This is quite enough to determine the question. The written bid, in connection with the advertisement and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam work. (Garfield *v.* United States, 93 U. S., 242; Ins. Co. *v.* Hearne, 20 Wall., 494.) The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to the work and prices contained in the bid. If the formal contract is susceptible of a different construction to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the government were under a mistake. It is shown that the work of making and putting in the coffer-dams and doing whatever else was necessary in connection with them, before the laying of the masonry could be commenced, was so expensive as to make it impossible that the prices named in the bid of the appellants could have covered that expense and the laying of the masonry also. There is no evidence to show that the parties intended to alter the terms of the bid as to work and prices. There are other considerations dwelt upon in the dissenting opinion of Judge Nott in the Court of Claims, and to which it is necessary only to refer, which enforce the conclusions thus reached. One of those considerations is the terms of the only other bid, as showing by the prices therein named for bid 1, bid 2, and bid 3, each separately, that the appellants

could not have been bidding for the work complete. The evidence on the point in question on the part of the appellants is largely in documents, while that relied on by the United States is oral, and some of it consists of recollections of conversations with the appellants, who are debarred by statute from being witnesses in their own behalf. We are of opinion that by the actual contract between the parties the appellants were not to do any of the work covered by the claim made by them under item 1 of the petition herein, and that the written contract must be reformed accordingly.

We are also of opinion that the Court of Claims placed too limited a construction upon the special act of Congress. The act speaks of the claim of the appellants as a claim "for alleged labor done and materials furnished under their contract with the United States for the building of the masonry-work for the piers and abutments of the bridge," giving the date of the contract. The Court of Claims had rejected item 2 in the first case because the formal written contract required the petitioners to do the work named in it. It had rejected item 3 because that contract gave the government power to reduce the dimensions of the piers and abutments. It was to obtain equitable relief in respect to those two items that the appellants applied to Congress. Their claim had been made in the eight items embraced in their petition in the first case. It had been made as a claim under their contract. It cannot be properly inferred, unless there is language necessarily leading to a contrary conclusion, that the claim referred to the Court of Claims by the act is to embrace less than what was embraced in items 2 and 3 in the first case, although item 3 is made out as for "loss of profits." The act refers "the claim" "under the contract" for hearing and adjudication; and jurisdiction is conferred on the court to proceed in the adjustment of "the accounts" between the persons making the claim and the United States as a court of equity jurisdiction. The court had decided that it could not take cognizance of item 3 because it was not a court of equity jurisdiction, and, therefore, could

not proceed to adjust the accounts any further than it had adjusted them. One object of the act was to remedy this defect. There is nothing in the use of the words "for alleged labor done and materials furnished," or of the words "to that end," which can limit or control the scope of the act as above explained. That scope is still further shown by the enactment that the court "may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require." The words "for alleged labor done and materials furnished" are, in view of the language of the entire act, not words of limitation but words of description. The court is authorized to adjust "the accounts" between the parties so far as they were not legal demands, and so far as they were equitable demands, unadjusted or unadjudicated, growing out of the contract, as a court of equity, and, for that purpose, to reform the contract according to the principles of equity, and then render judgment upon it as reformed. This power of the Court of Claims, under the act, extends to reforming the contract in respect to permitting the officers of the United States to materially vary the plans for the piers so as to essentially change the obligations of the parties.

As to items 3 and 4 in the new petition, which are the same as items 7 and 8 in the former case, not only were they legal demands, but they were adjudicated upon fully in that case and cannot be reopened. As to items 5, 6, and 7 in the new petition, they cannot, in view of the principles laid down in this opinion, be considered by the Court of Claims. The question of interest, under item 8, remains for that court to consider.

It is contended on the part of the United States that this court cannot, under its rules, hear this appeal, because there is not in the record any finding by the Court of Claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts.

Syllabus.

But the rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act; and in such a case, where an appeal lies and is taken to this court under section 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity appealed from other courts.

The judgment and decree of the Court of Claims is reversed, and the case is remanded to that court with directions to proceed in it according to law and in conformity with the opinion of this court.

REVERSED.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE COMPANY, v. DANIEL MCLAUGHLIN.

May 8, 1882.

1. Section 5057 of the Revised Statutes of the United States, requiring the assignee in bankruptcy to bring suit on all claims for the bankrupt estate within two years after the cause of action accrued, &c., does not impose a jurisdictional requirement and deprive the court of the power to entertain such a suit after the lapse of that time; but it is a statute of limitations and governed by the principles applicable to statutes of limitations.
2. It is too late to raise the point that the action is barred by a statute of limitation for the first time in an appellate court.
3. Although, under the Code of Civil Procedure of Wyoming Territory, the defense of the statute of limitation may be raised by special demurrer where the petition shows on its face the necessary facts, yet such a defense must be made in the court of original jurisdiction, before judgment, and cannot be made for the first time in the appellate court; and the record must show that the question was distinctly raised in the lower court.

ERROR to the Supreme Court of the Territory of Wyoming.

Homer Cook, for plaintiff in error.

William R. Steele, for McLaughlin, defendant in error.

Shellabarger & Wilson, for Kent, defendant in error.

Opinion of the court.

BLATCHFORD, J.—This suit was brought in the District Court of the first judicial district of the Territory of Wyoming, in and for Laramie county, by the assignee in bankruptcy of the Great Western Insurance Company to recover from Daniel McLaughlin the sum of $800, with interest at twelve per cent. from the 15th day of August, 1872, as the amount due and unpaid on a subscription for ten shares of the capital stock of the company owned by McLaughlin. The company was a corporation of the State of Illinois. In February, 1872, it was adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, and on the 11th of April, 1872, the plaintiff was appointed its assignee, and an assignment of all its property was executed to him. On the 5th of July, 1872, the bankruptcy court made an order that the entire amount unpaid of the capital stock of the company be paid to the assignee on or before the 15th of August, 1872, at his office in Chicago, and that in default thereof the assignee proceed to collect the same. The amount claimed in this suit is eighty per cent. on $1,000, being on ten shares of $100 each. The suit was commenced by a petition filed April 8, 1876. McLaughlin put in an answer setting up four several defenses. The fourth defense set up as a cause of action against the company, and as a set-off to the plaintiff's claim, that the company, before it was adjudged bankrupt, was indebted to the defendant on a balance due upon an account, in a specified sum, which was still due, and for which sum the defendant prayed judgment against the plaintiff. The plaintiff demurred by one demurrer to the second, third, and fourth defenses. The District Court overruled the demurrer as to the second and third defenses, and sustained it as to the fourth defense. To such ruling against the defendant he excepted. The case was tried by a jury, and a verdict was rendered finding for the plaintiff, and assessing his damages at $1,008. Thereupon a judgment was entered that the assignee recover from McLaughlin $1,008 and the costs of the action. McLaughlin, by a petition in error to the Supreme Court of the

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Territory, alleging thirty-two several errors made by the District Court, prayed for a reversal of the judgment. The Supreme Court entered a judgment that the judgment of the District Court must be reversed and held for naught, and then stating that "the court, further proceeding to render such judgment as the said District Court ought to have rendered, find that said court had no jurisdiction of said cause," and that it should have rendered judgment in favor of McLaughlin and against the assignee, and that judgment be rendered in favor of McLaughlin and against the assignee, and that McLaughlin recover from the assignee $59.25 costs, and that such judgment be remanded to the District Court for execution, and that a special mandate be sent to said court therefor. The assignee has brought the case into this court by a writ of error to the Supreme Court of Wyoming Territory.

The grounds on which that court proceeded in holding that the District Court had no jurisdiction, and in reversing the judgment of that court, are shown by its opinion, which is found in the record. The opinion proceeds upon the view that, because of the provisions of section 5057 of the Revised Statutes of the United States, the District Court had no jurisdiction of the suit. That section is as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." The view taken in the opinion is that this statute is not a statute merely limiting the remedy, but imposes an absolute limit; that, after two years, the assignee can neither sue nor be sued, but his office, for the purpose of commencing any suit, must be regarded as having expired; that no court has power to admit him to a status within the court, and that such want of power is want of jurisdiction. The opinion cites

the opinion of this court, delivered by Mr. Justice Miller, in Bailey *v.* Glover, 21 Wall., 342, and interprets it as holding that the statute (then section 2 of the act of March 2, 1867, 14 U. S. Stat. at Large, 518) is an absolute jurisdictional limitation, and thus, as an adjudication of the question, furnishing the rule which governs this case. This is an entire misconception of the decision in Bailey *v.* Glover. That decision established the contrary proposition. It was a suit in equity in which the assignee in bankruptcy, more than three years after the date of his appointment, filed a bill against three relatives of the bankrupt to set aside conveyances made to them by the bankrupt of all his estate in fraud of his creditors. It alleged that the bankrupt and the defendants kept secret their fraudulent acts, whereby the assignee and the creditors were prevented from obtaining any sufficient knowledge or information thereof until within two years before the filing of the bill. The defendants demurred to the bill on the ground that the suit was not brought within two years from the appointment of the assignee. The demurrer was sustained by the Circuit Court. The plaintiff appealed to this court. The report of the case shows that the defendants contended here that the case was not one of an ordinary statute of limitation, but that the statute was imperative and admitted of no exceptions as to any tribunal. If such contention had been regarded by this court as correct, the decision of the Circuit Court would necessarily have been affirmed. But this court held that the statute in question was a statute of limitation, and one of such a character as not to set up an absolute bar of two years from the mere lapse of that time, but to require the application to it of the principle that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by or becomes known to the party suing, or those in privity with him. On this view this court reversed the de-

cree below. This was a plain decision that the statute in question does not impose an absolute limit of two years after the appointment of the assignee, in respect to transactions which occurred before such appointment, and that there is no want of power in the court to entertain a suit after such two years have elapsed. This view was recognized and applied by this court in Gifford *v.* Helms, 98 U. S., 248, although there it was held that, on the facts, the assignee's right of action commenced at the time of his appointment. It is, therefore, clear that no support for the decision below is to be drawn from the case of Bailey *v.* Glover. The question is not to be treated as one of power or jurisdiction, but as one dependent on the principles applicable to statutes of limitation generally.

This being so, the record shows that no question as to the application of the statute to the case was raised in the District Court of the Territory by the defendant, either in pleading or on the trial, or before judgment. It is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by a statute of limitation, to raise the point for the first time in an appellate court. This principle is always applied to questions which are not questions of jurisdiction. (Storm *v.* United States, 94 U. S., 76, 81.)

It is, however, contended by the defendant that the question of the bar by the statute was presented in the Supreme Court of the Territory by the record from the District Court, because the petition did not state facts sufficient to constitute a cause of action, and could have been demurred to for that cause. Section 85 of the Code of Civil Procedure of the Territory of Wyoming provides that the defendant may demur to the petition when it appears upon its face either that the court has no jurisdiction or that the petition does not state facts sufficient to constitute a cause of action. Section 87 provides that the objection to the jurisdiction of the court, and the objection that the petition does not state the facts sufficient to constitute a cause of action, shall not be deemed to be waived by not taking them by either demurrer or answer. It is contended

that a petition which shows upon its face that the cause of action is barred by a statute of limitation is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defense of a bar by a statute of limitation to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so barred, and thus as not stating facts sufficient to constitute a cause of action.

The petition in this case sets out facts which show that the cause of action sued on accrued to the assignee more than two years before the bringing of the suit. Assuming the suit to be such a suit as is mentioned in section 5057, it is held by the Supreme Court of Wyoming (Bonnifield *v.* Price, 1 Wyoming, 172) that the rule is well established in that Territory, that where, from the face of the petition, it is apparent, without any further showing, that the claim is barred by a statute of limitation, a defendant may take advantage of such bar by a special demurrer to the petition. The same rule prevails in Ohio, (Sturges *v.* Burton, 8 Ohio St., 215; McKinney *v.* McKinney, Id., 423,) and in Kansas, (Lane *v.* Lane, 5 Kan., 134,) and in Nebraska. (Peters *v.* Dunnells. 5 Neb., 460.) The rule is founded on the view that in such a case the petition does not state facts sufficient to constitute a cause of action. But if, in the court of original jurisdiction, the defense of a statute of limitation is not raised by either demurrer or answer, and is not brought to the attention of the court which tries the cause, by some objection taken in a proper manner, before judgment, it cannot, under section 87 of the code of Wyoming, be raised for the first time in an appellate court. The effect of that section is only to permit the defendant to make the objection after demurrer or answer and before judgment. Under such a statutory provision it has been held that the objection may first be made at the trial, and even after the evidence is all in; (Coffin

v. Reynolds, 37 N. Y., 640; Lane v. Lane, 5 Kan., 134;) and that it may be made by stating it distinctly as a ground of objection to the introduction of evidence. (Lane v. Lane, *ubi supra.*) But unless it appeared by the record which was before the Supreme Court of Wyoming in this case that the objection had been taken in some proper manner in the District Court, the Supreme Court could not notice it. That court has power (Code, sec. 513) to reverse a judgment of the District Court for errors appearing on the record, and the petition in error (section 514) must set forth the errors complained of. Neither in the bill of exceptions, nor in the twenty-eight errors specified in the motion for a new trial in the District Court, nor in the thirty-two errors specified in the petition in error, is there any allusion to the statute of limitation.

The defendant contends that as the District Court sustained the demurrer to the fourth defense in the answer, and the defendant excepted to the ruling, the question as to whether the petition was sufficient as a pleading was thereby brought up, because the District Court ought to have given judgment against the party which committed the first fault in pleading. But we are of opinion that the record must show that the question as to whether it appeared by the petition that the action was barred by the statute was distinctly presented to and raised before the District Court. This does not appear, as before stated.

The defendant also contends that various objections and exceptions taken by him to the admission of evidence and to instructions to the jury, and various grounds of error stated in the motion for a new trial, raised the question referred to. It is sufficient to say that the objections to the admission of evidence merely state that the evidence is incompetent, immaterial, and irrelevant, without suggesting the question of the statute of limitation; and that the exceptions to the instructions to the jury and the grounds of error set forth in the motion for a new trial make no allusion to that question, nor is there any allusion to it in the record sent from the District

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Court. Under such circumstances the question cannot be raised in the appellate court. (Mays *v.* Fritton, 20 Wall., 414, and cases there cited; Beaver *v.* Taylor, 63 U. S., 46; Wheeler *v.* Sedgwick, 94 Id., 1.)

Because the Supreme Court of Wyoming held that the District Court had no jurisdiction of this suit, it did not examine any of the questions raised by the defendant in the bill of exceptions taken by him. As it improperly reversed the judgment of the District Court, its judgment must be reversed; and as it passed on no other question but the jurisdiction of the District Court, the case must, under the provisions of sections 701 and 702 of the Revised Statutes, be remanded to it, with directions to hear and determine the questions raised by the petition in error, and to take such further proceedings as may be in conformity with law and not inconsistent with the opinion of this court.

REVERSED.

C. W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE COMPANY, v. THOMAS A. KENT.

May 8, 1882.

ERROR to the Supreme Court of the Territory of Wyoming.

BLATCHFORD, J.—The facts shown by the record in this case are essentially the same as those in the case of the same plaintiff against McLaughlin, No. 261, and no question is presented in this case which was not presented in that. The decision in that case requires that the judgment of the Supreme Court of the Territory be reversed and that the case be remanded to it, with directions to hear and determine the questions raised by the petition in error, and to take such further proceedings as may be in conformity with law and not inconsistent with the opinion of this court in No. 261.

REVERSED.

THE CRANE IRON CO. v. AMOS HOAGLAND, JAMES BOYD, AND WILLIAM L. JOHNSON, COMMISSIONERS OF DRAINAGE, &C.; AND CHARLES STUART WURTS AND ROBERT LENOX KENNEDY v. SAME.

May 8, 1882.

The judgment of the Court of Errors and Appeals of New Jersey affirming the judgment of the lower court and remitting the record to the inferior court is the final judgment in the case, and not the order of the inferior court receiving and filing the remittitur; and a writ of error to operate as a supersedeas should have been within sixty days from such judgment.

ERROR to the Supreme Court of the State of New Jersey.

This opinion was rendered on a motion to discharge a rule to show cause why defendants in error should not be fined for contempt in proceeding to sell the property in controversy.

J. G. Shipman, for plaintiff in error.

Theodore Little, for defendants in error.

BRADLEY, J.—The controversy in these cases arose out of an assessment of benefits for the drainage of lands in New Jersey. It was decided by the Supreme Court of that State December 1, 1880. The Court of Errors and Appeals affirmed the judgment on the 18th of July, 1881, and the record was remitted August 31, 1881. On receiving the remittitur on that day, the Supreme Court entered a rule ordering it to be filed and the cause to be proceeded with according to law. Writs of error from this court to the Supreme Court of New Jersey were allowed and bonds approved October 27, 1881, and were filed in the clerk's office of the latter court October 28, 1881. The writs of error were properly directed to the Supreme Court, because at that time the record had been transmitted to that court, and was then in its possession. (See Atherton *v.* Fowler, 91 U. S., 148.) But at any time before the remittitur the writs might have been directed to the Court of Errors and Appeals, because the judgment of that court was the final judg-

ment in the cause, and until the remittitur was made it had possession of the record in contemplation of law. It is that judgment which is the object of revision here. The plaintiff in error insists that the action of the Supreme Court on receiving the remittitur was the final judgment. But this is not correct. Such action was not necessary to the jurisdiction of this court. A number of instances might be cited in which, without any remittitur, a writ of error from this court has been directed to the Court of Errors of New Jersey. This was the course in the noted cases of the State of New Jersey *v.* Wilson, 7 Cranch, 164, and Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, and in the late case of New Jersey *v.* Yard, 95 U. S., 104.

In those States where the highest court does not have possession of the record and does not render a judgment, but decides questions certified by the inferior courts, and merely issues a rescript directing the latter what judgment to render, the case would perhaps be different. But in New Jersey the record itself, or a transcript which stands for the record, is removed to the Court of Errors and Appeals, and a regular judgment is there rendered. For certain purposes, as in England on writs of error from the House of Lords, the judgment of the inferior court pending proceeding in error is supposed to be in existence. Action upon it may be brought, and, on failure to give proper bail in error, execution may be issued. But for all other purposes, when a writ of error goes to an inferior court, the Court of Errors and Appeals obtains possession of the cause and renders a formal judgment therein. If the judgment of the inferior court is reversed, the Court of Errors usually renders such judgment as ought to have been rendered, though it has the power to direct the court below what judgment to give. It is only necessary to open a book of New Jersey reports, containing decisions of the highest court, to ascertain its jurisdiction in this behalf. Thus in 2d Zabriskie, 623, is a judgment in the case of Demarcet *v.* Hopper, reversing the judgment of the Supreme Court in an action of ejectment and rendering judgment for the plaintiff; and in the

same book, page 725, is another judgment of reversal in the case of Hopper *v.* Hopper, coupled with a judgment for the demandant in an action of dower, with a direction to the Supreme Court to award a writ of inquiry to assess the damages and to issue execution therefor.

We think that the final judgment in these cases was rendered on the 18th day of July, 1881, being the judgment rendered by the Court of Errors and Appeals; and that as the writs of error were not issued and served until the 28th of October, more than sixty days thereafter, they were too late to operate as a supersedeas; and therefore the rules to show cause must be discharged.

Discharged accordingly. GRANTED.

V. K. STEVENSON ET AL. v. THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

May 8, 1882.

1. Under the law of Texas the lien acquired by a creditor without notice, by a judgment and levy of execution, is superior to the unrecorded deed of a vendee; and the purchaser under such execution with notice is entitled to all the rights of the creditor.
2. Hence the purchaser at a sale made under judgments which had been obtained prior to the recording of a mortgage, and without notice of it, obtains a better title than the mortgagee, even though the sale was made subsequent to the recording of the mortgage and with notice of it.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

W. S. Herndon and *A. Q. Keasbey*, for appellants.

W. D. Davidge and *James Lowndes* for appellees.

MATTHEWS, J.—In the view which we have taken of this case it becomes necessary to decide but a single question. The

facts necessary to its determination may be summed up as follows:

The Texas and Pacific Railway Company is a corporation created by acts of Congress for the purpose of constructing, maintaining, and operating a line of railway from a point at or near Marshall, in Harrison county, Texas, by way of El Paso, to the Pacific Ocean. By the terms of its charter it was authorized to purchase stock, land grants, franchises, and appurtenances of, and consolidate on such terms as might be agreed on with, any railroad companies theretofore chartered by congressional, State, or territorial authority, on the route prescribed, but not with any competing company; and thereupon all such interests and rights should vest in the Texas and Pacific Railway Company, the latter assuming any indebtedness of such companies, as they might agree, and the consolidation and purchase not impairing any lien which might exist thereon.

The Southern Pacific Railroad Company was a corporation of the State of Texas, and, being thereunto duly authorized, became consolidated with the Texas and Pacific Railway Company on March 21, 1872, the latter becoming thereby the purchaser, in consideration of $3,000,000 paid to the former, of all its property, rights, and franchises.

The Southern Pacific Railroad Company, which made this sale to and became consolidated with the Texas and Pacific Railway Company, was the successor in law of the Texas Western Railroad Company, in the following manner:

The original company was chartered in 1852 to construct a railroad from a suitable point on the eastern boundary of the State to El Paso on the Rio Grande.

In 1856 its name was changed by the Legislature of Texas to that of the Southern Pacific Railroad Company.

Prior to September, 1859, this company had completed twenty-five miles of road west from Marshall, and had earned, it is claimed, about 256,000 acres of land, granted to it by the State, but, having become insolvent, it was sold under execu-

tion upon a judgment at law on September 6, 1859, to R. V. Richardson.

This sale to Richardson was made under the provisions of the fifth section of the act of February 7, 1853, (Paschal's Digest, art. 4912,) which is as follows:

"The road-bed, track, franchise, and chartered rights and privileges of any railroad company in this State shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same; but the said road-bed, track, franchise, and chartered powers and privileges shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws of the State; and the said purchaser or purchasers, and their associates, shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company; and shall have power to construct, complete, equip, and work the road, upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of this State."

As authorized by this law, Richardson and his associates reorganized the Southern Pacific Railroad Company by the creation of a new capital stock, the largest part of which was subscribed and owned by Richardson himself and Jeptha Fowlkes, and the election of a board of directors and officers, as provided by their by-laws, on October 3, 1859.

On August 25, 1860, the Southern Pacific Railroad Company, as thus reorganized, executed two mortgages to R. V. Richardson and Vernon K. Stevenson as trustees, which were

acknowledged September 10 and proved in New York before a Texas commissioner September 12, 1860.

One of these mortgages was to secure a proposed issue of bonds, to the amount of $25,000,000, for purposes of construction and other necessary expenses, payable January 1, 1883, with interest at the rate of seven per cent. per annum, and covered all the property of the company, including its land grant from the State. The other covers one million acres of the land grant, to be selected by the company for sale to meet the accruing interest on the same bonds.

These mortgages were recorded in Harrison county, Texas, on March 1, 1861.

The complainants claim to be holders for value of about two hundred of the bonds secured by these mortgages, out of about three hundred and fifty, which was the whole number issued, and their bills were filed for the foreclosure of the mortgages, and the sale of the mortgaged property, for the payment of the amount due on account of the bonds and accrued interest.

Against the lien of these mortgages the appellee, the Texas and Pacific Railway Company, claims a paramount title. This title rests, primarily, upon a judicial sale of the same property and rights, then vested in the Southern Pacific Railroad Company, as it existed under the Richardson reorganization. The sale was made by the sheriff of Harrison county, Texas, on September 3, 1861, to H. S. Fulkerson, of the whole road and franchises of the company, as an entirety, under the provisions of article 4912 of Paschal's Digest, *supra*, upon executions levied under four judgments at law, as follows:

1. Judgment in favor of J. W. Saunders, April 6, 1859, for $300.09 and costs, $74.00, in all $374.09, upon which was credited before sale $277, leaving due a balance of $97.09. Execution was levied under this judgment August 9, 1860.

2. Judgment in favor of Henry Wickland, September 26, 1860, for $3,500 and costs. Execution issued and levied July 11, 1861.

3. Judgment in favor of Amelia Swanson, October 27, 1860, for $2,480.50 and costs. Execution issued November 22, 1860; levied January 3, 1861.

4. Judgment in favor of J. B. Williamson, October 23, 1860, for $1,000 and costs. Execution issued November 23, 1860; levied January 3, 1861.

The purchase-money at the sheriff's sale to Fulkerson was $7,500, which was just enough to satisfy the executions.

It will be observed that of these judgments the first alone was recovered prior to the date of the execution and delivery of the mortgages, but all of them were recovered, and executions issued upon the first, third, and fourth, and levied before March 1, 1861, the date of the record of the mortgages.

There is no claim and no proof that at the time of the levy of these executions the plaintiffs in the judgments had any notice of the existence of the then unrecorded mortgages to Richardson and Stevenson; and it is conclusively established as the law of Texas that the purchaser at such sale acquires a title superior to that of such mortgagees.

Article 4988 of Paschal's Digest reads as follows: "All bargains, sales, and other conveyances whatever, of any lands, tenements, and hereditaments, whether they may be made for passing any estate of freehold or inheritance, or for a term of years; and deeds of settlement upon marriage, whether land, slaves, money, or other personal thing, shall be settled or covenanted to be left or paid, at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and lodged with the clerk, to be recorded according to the directions of this act, but the same, as between the parties and their heirs, and as to all subsequent purchasers with notice thereof or without valuable consideration, shall nevertheless be valid and binding."

And article 4994 of Paschal's Digest provides: "Every con-

veyance, covenant, agreement, deed, deed of trust, or mortgage in this act mentioned, which shall be acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid, as to all subsequent purchasers, from the time when such instrument shall be so acknowledged, proved, or certified, and delivered to such clerk to be recorded, and from that time only."

These statutory provisions were construed by the Supreme Court of Texas in the case of Grace *v.* Wade, 45 Texas, 522. In that case the only question was, "Whether a vendee of land, who claims title by an unrecorded deed or bond for title, or the purchaser, with notice of such deed or bond, at execution sale on a judgment against the vendor, where the creditor has no notice of the title or claim of the vendee, at the date of the levy of the execution, has the better title?" The court affirmed the two propositions, that the lien acquired by a creditor without notice by the judgment and levy of execution is superior to the unrecorded deed of the vendee, and that a purchaser under the execution, with notice, is entitled to all the rights of the creditor. The court said: "Now, if the unrecorded instrument cannot take effect, but is void as to creditors, it is absurd to say that the creditor's lien does not bind the land to which it applies, or that it cannot be enforced by the sale of the land so bound by it for the payment of the debt, just as if no such instrument existed. And it would be equally as absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the land sold in open market, when once secured, can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satisfaction and discharge of his demand, except by becoming himself the purchaser."

The case of Price *v.* Cole, 35 Texas, 461, to the contrary, is directly overruled, the court saying: "We conclude by say-

ing, that while the judgment in Price *v.* Cole is not warranted by the previous decisions in our own courts or elsewhere, and must therefore be overruled, we adhere to and sustain the doctrine to be deduced from the case of Ayres *v.* Duprey, 27 Texas, 593, that one who purchases at sheriff's sale may claim protection under the statute as a purchaser, even when the judgment creditor himself is not, as creditor, within its protection, and *vice versa*. While he cannot bring himself within its provisions in the character of a purchaser, he or others subrogated to his rights may be entitled to its protection as creditor." This decision has been followed and approved in Grimes *v.* Hobson, 46 Texas, 416; Catlin *v.* Bennett, 47 Texas, 165, and Mainwarring *v.* Templeman, 51 Texas, 205, and we adopt it, as the law of Texas, applicable to and governing the present case.

It follows that the legal title of the Texas and Pacific Railway Company, derived through its purchase from and consolidation with the Southern Pacific Railroad Company, which duly succeeded to the title of Fulkerson, is superior to that of the mortgages under and through which the appellants claim as holders of the bonds. It is urged, however, on behalf of the appellants, that the circumstances of the execution sale to Fulkerson were such as to fasten upon him a constructive trust in their favor as creditors of the company; but, in our opinion, if that were conceded, there is no ground apparent on the record upon which that equity could be successfully asserted against the Texas and Pacific Railway Company, a purchaser for valuable consideration, having notice, it may be, of the existence of the mortgages to Richardson and Stevenson, but without notice of any facts which in equity would subordinate to them the rights acquired by the sheriff's sale to Fulkerson.

For these reasons the decree of the Circuit Court is affirmed.

Statement of the case.

THE WILSON PACKING COMPANY, ARTHUR A. LIBBEY, ARCHIBALD MCNEIL, AND CHARLES P. LIBBEY v. THE CHICAGO PACKING AND PROVISION COMPANY, B. B. HUTCHINSON, GEORGE W. HIGGINS, AUGUSTUS S. BURT, D. L. QUIRK, AND BENJAMIN F. MURPHY.

May 8, 1882.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

THE WILSON PACKING COMPANY, ARTHUR A. LIBBEY, ARCHIBALD MCNEIL, AND CHAS. P. LIBBEY v. ROBERT D. HUNTER, H. B. MERRILL, HENRY L. NEWMAN, AND THE ST. LOUIS BEEF-CANNING COMPANY; AND THE WILSON PACKING COMPANY, ARTHUR A. LIBBEY, ARCHIBALD MCNEIL, AND CHAS. P. LIBBEY v. ROBERT D. HUNTER, H. B. MERRILL, HENRY L. NEWMAN, AND THE ST. LOUIS BEEF-CANNING COMPANY.

1. Where the process of packing cooked meats had long been known, the mere change of the mode of cooking to one not before used is not patentable.
2. The Wilson reissued patent No. 6,370 for canning cooked meats, *construed* not to cover in its claim and specifications the Appert process, nor the process of cooking the meat to be canned by plunging it into water already heated to the boiling point; and the patent is void because all the elements included in it are old.
3. Reissued letters-patent No. 7,928 to John A. Wilson, for improvements in metallic cans for containing cooked meats, *held*, on the facts, to be void for want of novelty.

APPEALS from the Circuit Court of the United States for the Southern District of Illinois.

By stipulation of the parties these cases were argued together as one case.

The bills of complaint charged the defendants with the infringement of their several reissued letters-patent of the United States, of which the complainants were the assignees and owners.

Only two of these patents are relied on. These are: First,

reissued letters-patent No. 6,370, granted to William J. Wilson, dated April 6, 1875, upon an application filed April 2, 1875, "for improvements in processes for preserving and packing cooked meat;" and second, reissued letters-patent No. 7,928, granted to John A. Wilson, dated October 23, 1877, upon an application filed October 15, 1877, for "improvement in sheet-metal cases." The bills of complaint were dismissed on final hearing by the courts below in which respectively the cases were tried, and the complainants have brought them to this court by appeal. The controversy relating to these patents will be separately stated and considered.

The original patent to William J. Wilson bore date March 31, 1874. The specification of this patent was as follows:

"Be it known that I, William J. Wilson, of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful improvements in processes for preserving and packing cooked meats, and I do hereby declare that the following is a full, clear, and exact description thereof.

"The nature of my invention consists in a process for packing cooked meats for transportation in a compressed form, *while heated with cooking*, into an air-tight package, so as to preserve the meat in its integrity and retain all the natural juices and nutritious qualities of the meat.

"In carrying out my invention, the meat is first cooked thoroughly at a temperature of 212° Fahrenheit, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity. The meat is then in proper condition for eating, and is wholesome and palatable. A measured quantity of this cooked meat is then, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. The box or case is then closed air-tight upon the meat.

"The meat is thus packed and compressed in its natural state—that is, without disintegration or desiccation—and it

retains all the juices and nutritious qualities of the meat, the compression only removing the superfluous moisture. The meat thus put up is available at all times, even when cooking is impracticable, as it is already cooked before it is packed. It is more economical, as it is compressed and reduced in weight one-half from the uncooked weight, being free from bone and gristle and put up in a compact, portable shape for transportation, rendering the usual expensive cooperage unnecessary. Besides this, there is a great saving in the cost of transportation. A barrel containing two hundred pounds uncooked meat weighs gross three hundred and twenty pounds, meat, salt, brine, and barrel; while by my process it would weigh only one hundred and ten pounds gross, making a saving in cost of freight alone of nearly two-thirds.

"The box or case may be made of wood or metal, or both combined, of any suitable form or shape, and of any desired dimensions."

The claim was thus stated:

"1. The within-described process for packing cooked meats for transportation, by compressing the same into an air-tight package, so as to preserve the meat in its integrity, and retain all the natural juices and nutritious qualities of the meat, substantially as set forth.

"2. As a new article of merchandise, cooked meat put up in solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages, as set forth."

The differences between the specification and claim of the reissue and the original patents of William J. Wilson were these: First, in the omission from the second clause of the reissue specification of the words "*while heated with cooking*," contained in the corresponding clause of the original specification; second, the insertion of the word "*preferably*" in the third clause of the reissue specification before the words "*while yet warm with cooking*"; third, omitting from the first claim of his reissue the words "*while heated with cooking*," contained in the first claim of the original patent. In all other respects the

specification and claims of the original and reissued patents are identical. Therefore the original and reissued patents of William J. Wilson are the same, except that the reissue covers the process of packing the meat cold if preferred, while the original required that it should be packed while warm with cooking.

There is nothing in either the original or reissued patent in regard to the boiling, or in regard to any preliminary corning or curing of the meat.

While the causes were pending in the court below, and after the testimony-in-chief of the defendants had been taken, to wit, on October 26, 1880, the patentee and the complainants filed in the Patent Office a disclaimer disclaiming the word "preferably" where inserted in the specification of the reissued patent, and also any process described and claimed by which meat is to be compressed into the packages in any other than a warm or heated condition.

On the same day the patentee and complainants filed another disclaimer, whereby they disclaimed any interpretation or legal construction of the words of the specification of the reissued patent broader than is conveyed by the words, "the meat is first cooked thoroughly by boiling it in water, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity."

The effect of this disclaimer was to restore the claims of the reissued patent to what they were in the original patent, except that the claim of the original patent is limited by the second disclaimer to the packing of meat cooked by boiling. As amended by these disclaimers the claims of the reissued patent were as follows:

"First. The within-described process of packing, for transportation, meats cooked by boiling, by compressing the same while heated with cooking into an air-tight package, so as to preserve the meat in its integrity, and retain the natural juices and nutritious qualities of the same.

"Second. As a new article of manufacture, meat cooked by

boiling, put up while heated with cooking, so as to form a solid cake in the package in its natural state, without disintegration or desiccation, in hermetically sealed packages, as set forth."

It will be seen that the invention covered by the letters-patent of William J. Wilson after the disclaimer was a process consisting of the following elements:

1. The thorough cooking of the meat by boiling in water at a temperature of 212° Fahrenheit, and the removing of the bone and gristle.

2. The pressing of the meat while warm with cooking into a box or case with sufficient force to remove the air and superfluous moisture, so as to make the meat form a solid cake.

3. The closing of the box or case air-tight upon the meat.

It also covered the product of this process as described in the second claim.

The defense set up was want of novelty, and it was averred that the process described in the reissued letters-patent of William J. Wilson was also described in prior English, French, and American patents, which are specified, and was practiced by many persons, whose names and residences are given, at various dates prior to the application of Wilson for his patent.

William Henry Clifford, *John N. Jewett*, and *L. L. Bond*, for appellants.

J. W. Noble, *J. C. Orrick*, and *L. L. Coburn*, for appellees.

WOODS, J.—The patent does not specify what kind of box or case was required, nor what kind of meat was to be used in its processes, whether corned or fresh, nor in what manner or by what process it was to be compacted in the case or box, provided sufficient force was used to remove the air and all superfluous moisture and make the meat form a solid cake, nor the degree of warmth necessary in the meat when it was put in the case or box. Neither does it state the method by which the case was to be sealed up. It was simply required

to be "closed air-tight upon the meat," the air having first been excluded from the case by cramming the latter full of meat.

The patent, therefore, apparently covers only the process of cooking meat by boiling, and while it is still warm pressing it compactly in cases and sealing it up air-tight.

The second disclaimer of Wilson is a substantial admission that his patent only covered the process in which the boiling of the meat was one of the elements. That is to say, any one might pack cooked meats for transportation by compressing the same while heated with cooking into an air-tight hermetically sealed package, so as to preserve the meat in its integrity, and retain all its natural juices and nutritious qualities, substantially as set forth in the Wilson patent, and not infringe the patent, provided he did not cook the meat by boiling. If any other method of cooking the meat should be adopted, there would be no infringement.

The patentee and the complainants, it appears, were induced to make this disclaimer by the evidence introduced by the defendants in this case, especially the patent of A. S. Lyman, dated June 22, 1869, "for an improved mode of preparing and pressing roast meat in a condensed and concentrated form," and it amounts to an admission that they could not sustain the process covered by their patent, except as applied to boiled meats.

We are clearly of opinion that a change in the mode of cooking the meat from broiling, roasting, or steaming to boiling, all the other parts of the process remaining unchanged, cannot be called invention, and entitle the party who suggests the change to a patent for the process. "All improvement is not invention, and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art." (Pearce *v.* Mulford, 102 U. S., 112. See, also, Rubber-Tip Pencil Co. *v.* Howard,

20 Wall., 498; Hotchkiss *v.* Greenwood, 11 Howard, 248; Stimpson *v.* Hardman, 10 Wall., 117.)

If meat cooked by roasting or steaming, and put up in a given mode, formed a valuable article of commerce, the cooking of the meat in other ways, as, for instance, by boiling, would naturally occur to any one engaged in the business of packing such food for the market.

But we think there is nothing new in the process covered by the patent under consideration. Clearly all its separate elements are old and well known and have been long used. This is not controverted. The evidence shows that the process of boiling meat, packing it while warm in cans, and sealing it air-tight, had long been used before the application of Wilson for his original patent. There is, it is true, much conflict in the evidence, but taken altogether it leaves no doubt in our minds that the process of cooking meat, lobsters, and other articles of food by boiling and compacting them in cans while warm from the cooking, and then sealing them up air-tight, was practiced in many places and many years before the application of Wilson for his patent.

Complainants, however, insist that there are two elements in their process which, taken in connection with the others above mentioned, form a combination never used before the date of Wilson's patent.

The first of these is the subjecting of the cases, after they are packed and sealed air-tight, to what is known as the Appert process. This consists of placing the cans, after they have been filled and sealed up, in a bath of hot water, and thereby heating them, after which they are removed and punctured, and the heated air and gases which have formed in the cans are allowed to escape, and the puncture is immediately closed by a drop of solder.

The contention is that all this is made a part of the process covered by the Wilson patent by the description of the new article of merchandise covered by the second claim of the patent as "cooked meat" "in hermetically sealed packages." It

is insisted that "hermetically sealed packages" is a term which, among those dealing in canned goods, implies that the packages have been subjected to the Appert process.

We think that this is an unwarrantable stretch of the meaning of the second claim of the patent. The article of merchandise covered by the second claim is that produced by the process disclosed by the specification and first claim. The second claim expressly states that it covers cooked meat put up in solid form, &c., "in hermetically sealed packages, as set forth."

Recurring to the specification and first claim of the patent, we are not left in doubt about what the process of sealing the cases or cans hermetically is, which is set forth. The specification declares the invention to consist in a process for packing cooked meats into an air-tight package. The method of doing this is thus described: "A measured quantity of this cooked meat is, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case with sufficient force to remove the air and all superfluous moisture and make the meat form a solid cake. The box or case is then closed air-tight upon the meat." The process of hermetically sealing, as set forth, is simply to exclude the air from the case by filling it compactly with cooked meat still warm, so that the cover, when applied, will rest on the meat, and then closing the case by fitting on the cover air-tight.

There is no suggestion here of anything further to be done to make the package a hermetically sealed one. The process described leaves it hermetically sealed. There is no hint that the Appert process is to be subsequently applied as a part of the process covered by the patent. On the contrary, that idea is excluded by the terms of the second claim, "hermetically sealed, as set forth."

It is further contended by the appellants that the process disclosed by the Wilson patent includes the cooking of the meat to be canned by plunging it into water already heated to the boiling point; that is, the process of cooking is commenced by

placing the meat in water already heated up to 212° degrees Fahrenheit. By this method of cooking it is said the meat is preserved in its integrity, and all its natural juices and nutritious qualities are retained.

We think that the plan of beginning this process of cooking, by putting the meat in water already heated to the boiling point, is not set forth in the specification or claims. The conditions prescribed by the specification would just as well be filled by placing the meat in cold water and then heating the water to the boiling point, and allowing the meat to remain in it until cooked thoroughly. No person on reading the specification could extract the idea that there was any advantage to be gained by heating the water to the boiling point before placing the meat in it to be cooked, or that any such method was in the mind of the inventor. This part of complainant's process is clearly an after-thought, and not intended by the inventor to be covered by his patent when he applied for it. It is evident that the part of the process now under consideration is nowhere described in the specification in full, clear, and exact terms, as required by law. On the contrary, it is not described it all.

The Appert process, and the cooking of meats by plunging them into water already heated to the boiling point, may be of great advantage to the canned meats put up by the complainants, and to these practices their alleged superiority to the products of other parties may be attributed. But the trouble with complainants' case is that these elements are not included in the process disclosed by the patent which they allege is infringed by the defendants.

Our conclusion is, therefore, that there is nothing new in the process described in the William J. Wilson patent. All the elements of the process are old. They are merely aggregated, and the aggregation brings out no new product, nor does it bring out any old product in a cheaper or otherwise more advantageous way. This disposes of the first claim of the patent under consideration. If that claim cannot stand, it follows that the second claim, which is for the product made

by the employment of the process described in the first claim, is also invalid.

We are of opinion, therefore, that the patent to William J. Wilson, on which the complainants rely, is void for want of invention and for want of novelty in the process described therein.

We shall next consider that branch of the case which rests on the letters-patent to John A. Wilson for improvements in metallic cans for containing cooked meats. The specification declares that the "invention relates to hermetically sealed cans used in packing meats or other articles, and it consists in a pyramidal-shaped can having rounded corners, and both ends slightly flaring to form shoulders against which the head or end pieces rest."

"*a* represents the body of my can made in the form of a truncated pyramid with rounded corners, and with any desired number of sides, though I prefer to make it with four sides. Both ends of the body are made slightly flaring so as to form interior shoulders of offsets *a*, against which the heads B and C are to rest. The edges of these heads are turned outward, as shown, *a b*, and the flaring edge *d* of the end of the can is turned over the flange *b*, and the three thicknesses of metal pressed together by machinery, with or without solder, so as to make air-tight joints."

"In packing cooked meats it is done by means of a plunger through an aperture in the large head B, which opening is afterwards hermetically sealed by means of a cap or plate D.

"The can is to be opened at the larger end at or near the shoulder *a* by means of a suitable can-opener, so that when the can is reversed a slight tap on the smaller head *c* will cause the solidly packed meat to slide out in one piece, so as to be readily sliced as desired."

The claims which are in controversy in this case are the first and third, which are as follows:

"1. A can for packing food, hermetically sealed, and constructed of pyramidal form, with rounded corners, and offset

ends to support the heads, said heads being secured as shown and described."

"3. An improved article of manufacture, solid meat compressed and secured within a pyramidal case or can, so that said can forms a solid mold for the meat, and permits its discharge as a solid cake, substantially as described."

The defenses set up to this branch of complainants' case are that the devices covered by the patent are not new, and that the defendants do not infringe.

The evidence clearly shows that none of the defendants use cans "with offset ends to support the heads, said heads being secured as shown and described" in the patent. The cans which they use are made by turning a flange of the head down over the outside of the shell of the can, and fastening the head in place with solder.

It also appears that this method of fastening the heads and bottoms of the cans was practiced before the date of Wilson's application for his patent by Gibbie and Perl as early as 1872. The method was also described in the fifth addition of the French patent of Emile Peltier, dated April 1, 1859.

All, therefore, that is left to consider is whether the shape of the can described in the John A. Wilson patent is new, and whether the defendants use it.

The shape of the can described in the patent is pyramidal, with round corners, and with four or more sides.

It is admitted on the record by counsel for complainants that conical tin cans were made and used for canning alimentary substances, and sealed air-tight, prior to the date of the Wilson patents.

If it be conceded that the change of a conical can to a pyramidal can, with rounded corners, involves invention, the complainants are met with distinct and unequivocal evidence that cans used for containing preserved food, and closed air-tight, having four or more sides and pyramidal in form, with rounded corners, were mentioned in the fifth addition to the

patent of Emile Peltier, before referred to, and that the machinery for making them was therein described.

The cans used by the defendant the St. Louis Beef-Packing Company, and by the defendants Robert D. Hunter and others, and the Chicago Packing and Provision Company, are all included in the descriptions of the Peltier patent. The defense of want of novelty set up by the defendants against the first claim of the patent of John A. Wilson must therefore prevail.

What has been said leaves nothing for the third claim of the John A. Wilson patent to rest on.

There is nothing new either in the shape or construction or material of his cans. There is abundant evidence in the record of the packing, long before the date of his patent, of cooked meat in cans, so that the can served as a mold for the meat, and the meat formed a solid cake. The use of a pyramidal can, which was old, for the purpose of receiving the meat cake, which was also old, involved no invention.

The use of vessels with flaring sides as receptacles and molds for edible substances is as old as the art of cookery.

Our conclusion is that both the first and third claims of the John A. Wilson patent are void for want of novelty.

The result of the views expressed is that the decrees of the court below dismissing the bills of complaint were right, and should be affirmed.

AFFIRMED.

The case of the Wilson Packing Company and others *v.* William B. Clapp, appeal from the Circuit Court of the United States for the Northern District of Illinois, was argued at the same time with the cases disposed of in the foregoing opinion. The case involved the validity of both claims of the reissued patent of William J. Wilson and the first and third claims of the reissued patent of John A. Wilson. Upon these questions the opinions of the judges of the court were divided, and a

decree dismissing the bill was thereupon entered in accordance with the opinion of the presiding judge.

The views expressed by us in the foregoing cases dispose of this case also. We concur in the opinion of the presiding judge of the Circuit Court, and the decree of that court dismissing the bill must be affirmed.

AFFIRMED.

EX PARTE ROBERT BOYD, PETITIONER.

May 8, 1882.

1. The proceeding in aid of execution in its present form in New York, allowing a judgment debtor to be summoned before a referee and required to disclose his property, is a statutory process, much more extensive than the power of the court of chancery as administered independent of statute.
2. But even though the proceeding may have had historically its origin in the chancery courts, yet being only an auxiliary remedy for discovery merely, and being merely in aid of the legal right, it ceased as soon as the common-law courts became armed with adequate powers to execute their own process, and could be conferred on common-law courts as a part of their own process, and became a common-law remedy concurrent with the ancient equitable remedy.
3. Hence it may constitutionally be adopted by the Federal courts, under section 916 of the United States Revised Statutes, as a part of their procedure.

PETITION for writ of habeas corpus.

Roger M. Sherman, for petitioner.

S. F. Phillips, *Solicitor-General*, contra.

MATTHEWS, J.—It is made to appear by this application that a judgment was recovered in the Circuit Court for the Southern District of New York in favor of the United States against Robert Boyd, the petitioner, and Francis O'Rourke, on which execution was issued and returned unsatisfied, except in the sum of $200, leaving due thereon $8,128.92. It was thereupon ordered by the court, on motion of the plaintiff's attor-

ney, that the matter be referred to Joseph M. Deuel, Esq., a commissioner of the court, "to examine the said Robert Boyd and Francis O'Rourke, and take answers on oath concerning their property, and to reduce such answers and examination to writing, and also to examine on oath concerning such property such witnesses as may be offered by the respective parties, and reduce such examination to writing, and report such answers and examination, and all his proceedings under and by virtue of this order, to this court with all convenient speed; and the said Deuel is hereby appointed a referee in this action for the purpose aforesaid. And it is further ordered that the said Robert Boyd and Francis O'Rourke do appear before the said referee at his office in the post-office building, New York city, on the 22d day of May, 1879, at eleven o'clock A. M., to answer before said referee concerning their property as aforesaid; and for that purpose to appear before the referee from time to time as he shall direct and appoint."

The petitioner moved the court to vacate this order for illegality, which motion the court denied; and, being required to submit to the examination, the petitioner refused to take an oath to testify under said order, whereupon, on motion of the attorney for the United States, the Circuit Court ordered that he be attached and committed to the custody of the marshal, as punishment for a contempt of the court in so refusing to be sworn. From that imprisonment the petitioner seeks to be discharged, and to that end prays for a writ of habeas corpus.

The grounds on which the right to this relief is predicated are set forth in his petition as follows:

"Your petitioner is informed and believes that proceedings supplementary to execution, wherein your petitioner is restrained of his liberty, are not, by the laws of the State of New York, a remedy in common-law causes to reach the property of the judgment debtor allowed in actions at law in the courts of the United States by section 916 of the Revised Statutes of the United States; but, on the contrary, that these proceedings are, by the laws of the State of New York, prescribed

as part of a code to abolish common-law causes as such, and to amalgamate and indiscriminate common-law causes and suits in equity, and to confer upon the courts of that State, indifferently, in the same action, powers in actions at law and in equity. Your petitioner is informed and believes that the application of this provision of that code to the courts of the United States is not authorized by any act of Congress, and is in conflict with the provisions of article 3, section 2, of the Constitution of the United States, which preserves and establishes the distinction between relief at law and in equity. Your petitioner therefore avers and charges that the said Circuit Court was and is wholly without jurisdiction in the premises, and that therefore all its proceedings therein are null and void."

The material portions of the present statutes of New York referred to, and which were in force at the time of the adoption of the Revised Statutes of the United States, are as follows:

"*Proceedings Supplementary to Execution.*

"SECTION 292. (1.) When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, * * * is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court * * * requiring such judgment debtor to appear and answer concerning his property before such judge at a time and place specified in the order, within the county to which the execution was issued. * * *

"(3.) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

* * * * * * * *

"(5.) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against

him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

"SEC. 295. Witnesses may be required to appear and testify in any proceedings under this chapter in the same manner as upon the trial of an issue.

"SEC. 296. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath.

"SEC. 297. The judge may order any property of the judgment debtor, not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

* * * * * * * *

"SEC. 298. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner and with the like authority as if the appointment was made by the court according to section 244*. But before the appointment of such receiver the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the

judgment debtor, the same shall be filed in the office of the clerk of the court of the county where the judgment roll in the action * * * is filed; and the said clerk shall record the order in a book to be kept. * * * A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. * * * But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor, sought to be affected by such order, is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

"SEC. 299. If it appear that a person, or corporation, alleged to have property of a judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, but the judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity be given to the receiver to commence the action and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

"SEC. 300. The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

"SEC. 302. (1.) If any person, party or witness, disobey an order of the judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. (2.) And in all cases of commitment under this chapter * * *

the person committed may, in case of inability to perform the act required or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just."

Section 916 of the Revised Statutes, which repeats, in this respect, the provisions of section 6 of the act of June 1, 1872, "to further the administration of justice," is as follows: "The party recovering a judgment in any common-law cause, in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court, and such courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments as aforesaid, by execution or otherwise."

This provision of the Revised Statutes merely embodies and extends the principle contained in the fourteenth section of the judiciary act of 1789, (1 Stat. at Large, 81,) which, with the subsequent legislation of Congress in furtherance of it, has been repeatedly the subject of consideration in this court. (Palmer *v.* Allen, 7 Cranch, 550; Wayman *v.* Southard, 10 Wheat., 1; Bank of the United States *v.* Halstead, 10 Wheat., 51; Boyle *v.* Zacharie, 6 Peters, 654; Beers *v.* Haughton, 9 Peters, 355; Ross *v.* Duval, 13 Peters, 57; U. S. *v.* Knight, 14 Peters, 312; Duncan *v.* Darst, 1 Howard, 304; McCracken *v.* Hayward, 2 Howard, 611; Homer *v.* Brown, 16 Howard, 363.)

It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress under the Constitution, as well as that of the courts of the United States acting under its authority, extends to the adoption of the laws of the several States, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to *all proceedings thereupon;* as in Beers *v.* Haugh-

ton, *supra*, where it was held to include proceedings on the part of the judgment debtor for his exoneration under insolvent laws of the State from imprisonment under a *ca. sa.*, and the consequent discharge from liability of the special bail.

It is contended, however, on behalf of the present petitioner, that the proceedings under which he has been committed to the custody of the marshal and restrained of his liberty, in their origin and nature are of equitable jurisdiction exclusively, as distinguished from proceedings at common law, which, by the prohibitions of the Constitution of the United States, Congress cannot lawfully authorize the courts of the United States to administer except by bill in chancery.

The jurisdiction of the courts of chancery in New York, exercised prior to the adoption of its present code, which authorized a discovery of assets from a judgment debtor in aid of an execution, was statutory. It was conferred and defined by secs. 38 and 39 of title II, art. II, 2 Rev. Stats. of New York, 173, 174. It was therein provided, that "whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money, or thing in action due to him or held in trust for him; and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgment out of any personal property, money, or things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by

the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not."

It is said in argument by Mr. B. F. Butler, in Mitchell *v.* Bunch, 2 Paige Ch., 606, (22 Amer. Dec., 671,) that these provisions of the Revised Statutes were passed in affirmance of the doctrine of Hadden *v.* Spader, 20 Johns., 554. That case, however, did not go upon any idea that a bill in equity would lie against a judgment debtor for a general discovery of assets, but merely upon the ground of a jurisdiction to discover and apply equitable assets specifically described; the question being, as it was put by Woodworth, J., "whether a debtor, who has placed his funds in the hands of a trustee, where they cannot be reached by an execution at law, can put his creditor at defiance and enjoy the benefit of these funds, which ought to be appropriated to the payment of his debts."

This case was preceded by the decisions of Chancellor Kent in Hendricks *v.* Robinson, 2 Johns. Ch., 283; Brinkerhoff *v.* Brown, 4 Johns. Ch., 671; and McDermott *v.* Strong, 4 Johns. Ch., 687.

In Hendricks *v.* Robinson, *supra*, the chancellor said: "I have no doubt that this court can and ought to lend its aid, whenever that aid becomes requisite to enforce a judgment at law, by compelling a discovery and account, either as against the debtor, or as against any third person who may have possessed himself of the debtor's property and placed it beyond the reach of an execution at law. The preliminary step which seems to be required is that the judgment creditor should have made an experiment at law, and bound the property, by actually suing out execution;"—citing Angell *v.* Draper, 1 Vern., 399; Lord Nottingham, cited in 1 P. Wms., 445; Stileman *v.* Ashdown, 2 Atk., 476; Shirley *v.* Watt, 3 Atk., 200.

In Brinkerhoff *v.* Brown, *supra*, he said that it was the settled rule in chancery that the plaintiffs must show that they have taken out execution at law and pursued it to every available extent against the property before they can resort to that court for relief; that the presumption is that the court which

renders judgment is competent to enforce it; that "if he seeks aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a legal preference or lien upon the chattels." The opinion cites the case of Taylor *v.* Hill, 1 Eq. Cas. Abr., 132, pl. 15, before Lord King in 1705, where the bill having been filed *before execution* for discovery of particular specified effects of the judgment debtor in the hands of a third person, a demurrer was allowed; but the chancellor said it would not lie against the debtor himself, nor against a third person, to have a general discovery. And in McDermott *v.* Strong, *supra*, the chancellor said: "I regard the law to be clearly settled, that before a judgment creditor can come here for aid against the goods and chattels of his debtor, or against any equitable interest which he may have therein, he must first take out execution, and cause it to be levied or returned, so as to show thereby that his remedy at law fails, and that he has also acquired by that act of diligence a legal preference to the debtor's interest."

It is quite apparent from this review of the decisions upon the point in New York prior to the adoption of the provisions of the Revised Statutes of that State on the subject, that the latter gave a much more extensive remedy than was supposed to exist by virtue of the customary jurisdiction of the chancery court, particularly in requiring, when sought, from a judgment debtor a general discovery of assets, legal and equitable, for the purpose of enabling the judgment creditor to apply them to the payment of his judgment.

In Mitchell *v.* Bunch, *supra*, Chancellor Walworth seemed to regard the jurisdiction of chancery, independent of the statute, as equally extensive, and refers to the case of Edgell *v.* Haywood and Dawe, 3 Atkyn, 352, decided by Lord Chancellor Hardwicke in 1746, as a direct authority in support of the bill in the case before him, and as a decision which had never been questioned; but the case before Lord Hardwicke was not that of a bill for general discovery, but for a discovery

in respect to assets alleged to be in the hands of the co-defendant as executor, applicable to the payment of a legacy which belonged to the judgment debtor under a will, and which the complainant was entitled to have appropriated to the payment of his judgment, by virtue of the provisions of the act of 10 George 2, c. 26, for the relief of insolvent debtors, under which the debtor's person had been discharged, as an insolvent, from liability to be taken in execution. The right to the remedy in equity in that case was put distinctly upon the ground that the method by which the judgment creditor might have reached the property of his debtor, by proceeding at law against his person, having been taken away by the statute, the choses in action were equitable assets which a court of chancery would appropriate to the benefit of his creditors.

Mr. Hare, in his Treatise on Discovery, ch. 5, sec. 3, p. 84, ed. 1876, states that "there are some early cases which appear opposed to the rule which has been stated in the preceding sections, that a discovery will only be given to be used as evidence at a trial," but adds that "the cases which are cited in support of a jurisdiction of this nature seem to be chiefly bills for relief raising a different and substantive equity." He refers, however, to Mountford *v.* Taylor, 6 Ves. Jr., 788, as a case where Lord Eldon seems to have acted upon the doctrine of a general right of the creditor to a discovery, in order to make his judgment available, in consequence of the admission of its correctness by counsel. That was the case of a bill by judgment creditors who had sued out elegits for a discovery of freehold estates, charging that the defendant, upon his election as a member of Parliament, previously to the judgment, gave in his qualification, and that if the estates composing it were conveyed away since, it was without consideration. The lord chancellor remarked on the hearing that he was not quite clear that such a bill must not allege that at a given time the defendant was seized of given lands, (not simply suggesting, as a fishing bill, that at some time or other he had some land,) and that he conveyed those lands away fraudulently to put them out of the

reach of this creditor. Afterwards he overruled the demurrer, saying: "But the bill charges that the defendant delivered in a schedule of the particulars of his estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence that he has lands liable to execution, as they may be unquestionably. Upon that I think he must answer."

It thus appears that the proceeding in aid of execution, in its present form, in New York, as well as that in which it was administered under the Revised Statutes by the court of chancery, was a statutory process, and did not form any part of that jurisdiction in equity which, as vested in the courts of the United States by the Constitution, is assumed to be inalienable. And the remaining question, therefore, becomes not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in anywise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether by the adoption of that instrument all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it.

The conclusion will be not less clear, however, if we concede that the proceeding in question belongs historically, as to its form, to the administration of chancery courts. If we regard its nature, it will be perceived that it is, so far as it relates merely to the discovery of the debtor's assets, a collateral and auxiliary remedy. If the discovery results in ascertaining the existence of property subject to levy under execution, then the remedy at law is perfectly restored; or if, by lawful power over the person of the debtor, he may be compelled by a court of law to apply his property to the payment of his creditor's claim, the satisfaction is complete. If, on the other hand, other parties with adverse claims are revealed, or obstacles to the pursuit of the legal rights of the judgment creditor are brought to light, or the interests to be subjected are not cognizable at law, or the equities require to be marshalled, it may be

that relief can only then be had in a court of equity, where all parties can be made to appear, all conflicting claims adjudicated, and the complete remedy moulded to fit the circumstances of the case.

But here we have nothing to do with any question but that of discovery. The only relief sought is knowledge of property belonging to the debtor, applicable, either at law or in equity, to the payment of the creditor's judgment. What shall be done, after that knowledge has been acquired, is to be determined upon the circumstances as they may then appear, and cannot now be considered; for the proceeding for discovery is distinct and entirely separable from the subsequent relief, if any shall then be sought.

Now, it is of the essence of the jurisdiction of courts of equity, in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction, in the words of Story, (Eq. Jur., sec. 1495,) that "courts of equity will not entertain a bill for discovery to assist a suit in another court if the latter is, of itself, competent to grant the same relief; for in such a case the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending." It follows, then, that although at one time courts of equity would entertain bills of discovery in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged by competent authority to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would at least become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or defendant of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer under oath all relevant interrogatories properly exhibited; nor to compel the

production of books, deeds, or other documents, important as instruments of evidence, when the court of law in which the suit is pending is authorized by summary proceedings to enforce the same right.

But, even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore exercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems. No one has ever questioned the authority of Congress to make parties to a suit competent witnesses, or to confer upon courts of law power to compel the production of books and papers, because discovery was an ancient head of equitable jurisdiction. It is the very office of the principle of equity to supply defects in the law, and it is not to be regarded as anomalous that the technical law should, in the course of its necessary development, incorporate into its own organization improvements in procedure first introduced as equitable remedies. It is this very capacity of parallel growth that constitutes and perpetuates the harmonious co-existence of the two departments of our jurisprudence. Its history furnishes many examples and illustrations of this tendency and of its results.

And certainly there is nothing in the nature of an examination of a judgment debtor upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate as a proceeding at law, under the orders of the court where the record of the judgment remains and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located by legislative authority to

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meet the requirements of judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect those distinctions may be supposed to be recognized in the Constitution, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently, as an instrument of justice in the hands of courts of whatever description.

The application for the writ of habeas corpus is accordingly denied.

DENIED.

C. E. MITCHELL, ADMINISTRATOR DE BONIS NON OF C. S. BARRON, DECEASED, v. JOHN H. DOWELL AND H. M. MANDEVILLE, LATE PARTNERS AS J. H. DOWELL & CO.; AND JOHN H. DOWELL AND H. M. MANDEVILLE, LATE PARTNERS AS J. H. DOWELL & CO., v. C. E. MITCHELL, ADMINISTRATOR DE BONIS NON OF C. S. BARRON, DECEASED.

May 8, 1882.

1. Where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which, it turns out, cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law.
2. Hence, where a suit in chancery was instituted to foreclose a mortgage securing certain notes, and the mortgage turns out on the proofs to be void, the court has no jurisdiction to give a personal decree on the notes, and should dismiss the bill without prejudice.

APPEALS from the Circuit Court of the United States for the Eastern District of Arkansas.

These are cross-appeals from the same decree, and they bring up the same record. The original bill was filed August 22, 1877, by John H. Dowell and H. M. Mandeville, lately partners under the name of J. H. Dowell & Co., against one Askew, as administrator of the estate of Claiborne S. Barron,

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deceased, Margaret Barron, his widow, his three children, and William H. Brazell. Askew resigned pending the suit, and C. E. Mitchell, the administrator *de bonis non*, was made party defendant in his stead.

The object of the bill was to foreclose a mortgage executed by William H. Brazell as surviving partner of the late firm of Barron & Brazell, in the name of said firm, on certain real estate in the State of Arkansas, to secure three notes for $2,851 each, also executed by Brazell in the name of the firm and as surviving partner thereof.

It appeared from the evidence that in the year 1873 the complainants were cotton factors and commission merchants in St. Louis, and on October 4 of the same year Barron and Brazell formed a partnership under the name of Barron & Brazell, to continue two years, and at once began business.

The complainants became the factors and commission merchants of Barron & Brazell. On October 4, 1875, the day upon which the partnership expired by its own limitation, Barron died. His firm was on that day indebted to complainants for advances in the sum of $15,989. Brazell as surviving partner was left in possession of the assets of the late firm, consisting of a large stock of goods and a large number of notes and accounts. With these assets Brazell continued business in the firm-name until the making of the notes and mortgage which are the basis of this suit.

On April 15, 1876, upon an accounting and settlement between the complainants and Brazell, there was found to be due the former the sum of $8,456. Thereupon Brazell, in the name of the late firm of Barron & Brazell, made and delivered to complainants three notes, which in the aggregate amounted to the sum so found due, and to secure the same executed a mortgage on a parcel of real estate in the town of Hope, in the State of Arkansas, the legal title to which had been in Barron at the time of his death.

The defenses made to the bill were: (1) That there was nothing due from the late firm of Barron & Brazell on the

notes which the mortgage was given to secure; and (2) that neither Brazell nor the firm of Barron & Brazell had any title to the real estate conveyed by the mortgage, but that it had been the individual property of Barron, and on his death descended to his heirs, and that the mortgage executed upon it by Brazell after Barron's death was therefore void.

Upon final hearing the Circuit Court was of opinion that the amount specified in the notes, to secure which the mortgage was executed, was due to the complainants from Brazell and the estate of Barron, his late partner, but was also of opinion that the real estate described in the complainants' bill, and alleged to be partnership property of the late firm of Barron & Brazell, had never been the property of the partnership, but had been the individual property of Barron, and that the title thereto was in his heirs, and that Brazell, as surviving partner, "had no right or authority to execute said mortgage on said property, and that said mortgage deed was void and of no effect."

Thereupon the court decreed that "so much of complainants' bill as prays a decree of foreclosure of said mortgage be denied," and rendered a decree against the administrator of Barron's estate and Brazell for the amount due on the notes purporting to be secured by the mortgage.

The complainants and the administrator of the estate of Barron have both appealed from this decree.

Clark & Williams, for Mitchell.

W. F. Henderson and *A. H. Garland*, for Dowell & Co.

WOODS, J.—Without going into a discussion of the evidence on the subject, we declare our opinion to be that the Circuit Court was right in holding that the title to the property described in the mortgage executed by Brazell in the name of the late firm of Barron & Brazell had never been either in the late firm or in Brazell, but was in Barron, the deceased member of the firm, at the time of his death, and that at the date

of the mortgage the title of the mortgaged premises was in the heirs of Barron.

When this fact was established by the evidence and found by the court below, its jurisdiction, sitting as a court of equity, to proceed any further in the cause was lost, and it was without authority to render a decree upon the notes which the invalid mortgage was intended to secure.

When the court found there was no mortgage, there was nothing left for it to act upon but the promissory notes, and on that cause of action there was a plain, adequate, and complete remedy at law, and it should have dismissed the bill without prejudice to an action at law.

The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law. (Russell *v.* Clarke, 7 Cranch, 69; Price's Patent Candle Co. *v.* Bauwen's Patent Candle Co., 4 Kay & Johnson, 727; Bailey *v.* Taylor, 1 Russell & Mylne, 75; French *v.* Howard, 3 Bibb, 303; Robinson *v.* Gilbreth, 4 Bibb, 184; Nourse *v.* Gregory, 3 Litt., (Ky.,) 378.)

We are of opinion, therefore, that the decree of the Circuit Court should be reversed and the cause remanded with directions to dismiss the bill without prejudice to an action at law on the notes which the invalid mortgage purported to secure. And it is so ordered.

REVERSED.

BENJAMIN F. FLANDERS, DEPUTY GENERAL AGENT OF THE TREASURY DEPARTMENT OF THE UNITED STATES, v. ABRAHAM B. SEELYE.

May 8, 1882.

A New Orleans firm receives from a special treasury agent certain cotton seized under the act of March 12, 1863, and at his request pays certain charges on it. On a subsequent order the firm delivers up the cotton to the claimant of it and collects from him these charges, which are paid under protest. The claimant before obtaining the cotton gives a bond to save harmless the government and the treasury agents on account of the seizure and detention of the cotton and of any damages they might sustain by reason of such seizure. The claimant sues the firm for the charges so paid and recovers them back. On suit by one of the firm against the treasury agent: *Held*, That as the firm had not notified the agent of the pendency of the suit, nor called him in to defend it, he was not liable unless he could not have successfully defended the suit brought by the claimant, and that the court having given a certificate of probable cause, the bond given by the claimant would have been a perfect protection to the officer, and there could have been no recovery against him.

ERROR to the Circuit Court of the United States for the District of Louisiana.

S. F. Phillips, Solicitor-General, for plaintiff in error.

H. N. Ogden, for defendant in error.

BLATCHFORD, J.—This suit was brought in the Sixth District Court for the parish of Orleans, in the State of Louisiana, by Seelye, the defendant in error, against Flanders, the plaintiff in error, in November, 1871, and was removed by *certiorari*, before issue joined, into the Circuit Court for the District of Louisiana. In his petition filed in the State court, Seelye claimed to recover from Flanders the sum of $6,233.61, with legal interest from judicial demand. The grounds of the claim, as set forth in the petition, were, that in March, 1866, one hundred and seventy-eight bales of cotton were delivered at the pickery of the firm of Seelye & Atwood, in New Orleans, of which firm Seelye was a member, under the instructions of

Flanders, who was at that time acting supervisor and special agent of the Treasury Department of the United States; that the firm received from Flanders at the same time a written order to pay the charges on the cotton, amounting to $5,907.45; that the firm, in obedience to those instructions, received the cotton and paid the charges; that in April, 1866, the firm received an order from one Burbridge, supervisor and special agent of the Treasury Department of the United States, directing them to deliver said cotton to one Harrison, but to retain the charges and expenses on said cotton; that in obedience to said order the firm delivered the cotton to Harrison, and received from him the amount of charges originally paid by them, and their own charges for storage of the cotton, being in all $6,063.81; that the amount was paid by Harrison under protest, and he subsequently sued Seelye and another person, as composing the firm, and recovered a judgment against them in the Circuit Court of the United States for $4,661.45, with interest from June, 1866, to July, 1871, and costs, making in all $5,891.44; that that sum was paid by Seelye to Harrison in satisfaction of that judgment; that he also paid, as costs of court in that suit, $92, and for counsel fees in defending the suit $250; and that these sums, with the amount of the judgment, make the $6,233.61. The petition alleges that all that Seelye so did in the premises, and all that he was so finally compelled to pay, was the direct result of the written orders received by the firm from Flanders, and claims that Flanders is bound to reimburse to him the entire amount so paid, either in direct obedience to his orders, or as the necessary result of that obedience. In January, 1872, Flanders filed exceptions in the Circuit Court to the petition, which were overruled by the court in April, 1872. These exceptions raised the questions that Seelye had no right of action alone, and that the court had no jurisdiction. After the overruling of these exceptions, Flanders filed a pleading combining exceptions with an answer. The exceptions related to the defenses of prescription and want of jurisdiction. The answer set up that when

Seelye received the cotton from Flanders and paid the charges, he knew that Flanders had taken the cotton in his said official capacity, acting under the act of Congress approved March 12, 1863; (12 Stats. at Large, 820;) that the charges directed by Flanders to be paid were a legal charge on the cotton under the provisions of said act; that they were refunded by Harrison to the firm as an admitted claim; that Harrison then brought the said suit to recover back the amount he had so allowed and paid; that the defendants in said suit set up in their answer therein that they received the cotton from Flanders, acting as such special agent, and paid by his orders the charges thereon, and the same were lawful charges thereon, and were acquiesced in by Harrison and reimbursed to them; that after judgment in the suit the defendants in it sued out a writ of error to this court, which writ they failed to prosecute, and it was, therefore, dismissed by this court in December, 1870; that in July, 1871, they voluntarily paid the judgment; that the defense set up in the suit was, if founded in fact, a good and valid one, and their neglect to prosecute it cannot be allowed to operate to the prejudice of Flanders; that the Circuit Court had no jurisdiction in the suit; that Seelye lost all recourse against Flanders, if any he ever had, by reason of his failure to plead to the jurisdiction of the Circuit Court in the suit, and because of his failure to prosecute said writ of error; and that Flanders is not responsible for the costs incurred by Seelye in the suit, or for his counsel fees therein. The answer concluded with these words: "And for all such matters and things in plaintiff's petition contained as are not herein replied to, respondent for answer pleads the general issue, and prays to be hence dismissed with costs." The suit was tried by a jury in the Circuit Court in April, 1873. On the 19th of March, 1874, the court set aside the verdict and granted a new trial. On the 27th of March, 1874, an exception was filed alleging, as a peremptory exception to the petition and the action, that the allegations in the petition, if true as pleaded, are insufficient in law to entitle the plaintiff to any

recovery against the defendant; "for the same do not disclose any cause of action in behalf of said plaintiff against said defendant." The suit remained in this condition for nearly five years, when, in January, 1879, the defendant pleaded all applicable prescriptions as a peremptory exception. Then the parties filed a written stipulation agreeing to waive the intervention of a jury, and submitting the cause to the court "upon the issues of fact as well as of law." The findings and the judgment of the Circuit Court are embraced in one paper. It states that the court, "having heard the evidence and the arguments of counsel, overrules all the exceptions taken by defendant to the plaintiff's petition." It then specially finds the facts, and awards judgment to the plaintiff for $6,233.61, with interest and costs. It also grants a certificate of probable cause for the seizure of the cotton, and for all the doings of Flanders in the premises, as deputy general agent of the Treasury Department of the United States, and directs that no execution shall issue on the judgment. There is no bill of exceptions in the record. As the findings are special, the review by this court may extend to the determination of the sufficiency of the facts found to support the judgment.

The following facts were found by the Circuit Court, only those being stated here which are material in the view we take of the case, although some others were found: The 178 bales of cotton were seized while in the possession of Harrison, under color of the act of March 12, 1863, (12 U. S. Stats. at Large, 820,) by an assistant special agent of the Treasury Department of the United States. The cotton was shipped from Shreveport, consigned to one Burbridge, supervising special agent of the Treasury Department at New Orleans, subject to charges and freight amounting to $5,907.45. Seelye's firm received the cotton from a steamboat and gave a receipt for it, which stated that they held it subject to the order of the collector of the port of New Orleans. The firm paid said amount of freight and charges to the steamboat, on an order signed by Flanders, as deputy general agent, reading thus: "Seelye

Opinion of the court.

& Atwood's press will pay the within charges and hold the amount against the cotton." This was in March, 1866. On the 18th of April, 1866, Flanders, as such deputy general agent of the Treasury Department, issued an order to Burbridge, as such supervising special agent, directing him to release the cotton to Harrison, on his giving a bond in $25,000 to save harmless the Government of the United States for seizure, detention, or damage. On the same day Harrison executed his bond in that amount, in which he bound himself to save harmless the seizing agent, and all other agents and officers of the Treasury Department, and also the Government of the United States, on account of the seizure and detention of the cotton and on account of any damages they might sustain by reason of said seizure. On the next day Burbridge issued an order directing Seelye & Atwood to deliver the cotton to Harrison on his paying all proper and legitimate charges, including the charges for transportation to Shreveport. The firm delivered the cotton to Harrison on the 23d of April, and he then paid them the $5,907.45 claimed as charges on the cotton, and they gave him a receipt for it, which stated that he reserved "all rights or claims not relinquished under order of the treasury agent who released said cotton to him." Shortly afterwards Harrison sued the firm in a court of the State to recover back the amount so paid by him. The firm removed the suit into the Circuit Court of the United States, and filed their answer averring that they received the cotton by order of Flanders, special agent of the Treasury Department, and by his order paid the charges on the same, which were reimbursed to them by Harrison on the delivery of the cotton, and that the same were lawful charges on the cotton, acquiesced in and paid by Harrison on the delivery of the cotton, and further pleading a general denial. In February, 1868, a final judgment was rendered in favor of Harrison against the firm for $4,661.45, from which the firm sued out a writ of error to this court, which was dismissed with costs by this court, for want of prosecution, in December, 1870. In

July, 1871, Seelye paid out of his individual means to Harrison $5,891.44, in full satisfaction of said judgment and costs. In defending the suit Seelye paid from his individual means $92 costs and $250 counsel fees.

As grounds for reversing the judgment below, the counsel for the plaintiff in error contends in his brief that there is nothing to show that Harrison could have regained the cotton except upon the very conditions which he accepted, namely, that he would receive it at New Orleans and would defray all charges connected with its having been carried thither; that except the redelivery of the cotton, the record shows nothing to defeat the presumption, arising from the time and place of the seizure, that the cotton was properly captured and might have been held; that the judgment obtained by Harrison was *res inter alios* as against Flanders; that Seelye cannot recover in this suit without showing that he could not have successfully resisted the suit by Harrison; that the agreement of Harrison to hold the United States harmless on account of the seizure required him to repay to the United States any money which they had already paid upon that account, as well as any which they might thereafter pay because of obligations then existing; that the question in its present form is not affected by the fact that Harrison paid Seelye without waiting for the United States to pay Seelye, and then demand repayment from Harrison; that, in point of right, Harrison, by paying Seelye, paid his own debt; that his accepting from Burbridge an order for the cotton, on paying all proper and legitimate charges, including the charges for transportation to Shreveport, is a contemporaneous interpretation of what was meant by saving the United States and their agents harmless; that, originally, Seelye & Atwood might have recovered from the United States, or, perhaps, from Flanders, for the freight and charges paid on the order of Flanders, but the acceptance of payment from Harrison, who acted in the matter substantially as an agent of the United States, ended the original obligation; and that no subsequent transaction between Harrison and Seelye, whether

voluntary or involuntary on the part of Seelye, could revive such obligation, or impose any new duty in the premises on either the United States or Flanders.

It is manifest that the judgment rendered against Flanders in the present suit is founded on the fact that Harrison recovered his judgment against the firm, and that Seelye paid to Harrison the amount of that judgment, and also paid the expenses of defending the suit in which the judgment was recovered. The petition shows this, and so do the findings and judgment. The amount claimed by Seelye in the petition and the amount recovered by him is the exact amount of the Harrison judgment recovered July 13, 1871, and of the costs and counsel fees paid by Seelye. Prior to the bringing of the suit by Harrison, the firm had been fully reimbursed by Harrison for the charges which they had paid and incurred on the order of Flanders. Although the judgment in that suit, and the payment by Seelye of its amount and of the expenses attendant on the defense of the suit, are the sole ground of the claim made in the present suit and the sole foundation of the judgment recovered in it, yet Flanders was neither a party nor a privy to the suit brought by Harrison, and it is not alleged in the petition, nor found as a fact by the Circuit Court, that Flanders, or the Government of the United States, or any officer or agent of the government, had any notice of the bringing or pendency of the suit brought by Harrison, or any opportunity to assume or control or take part in its defense. The recovery in the present suit is, by the operation of the certificate of probable cause granted by the Circuit Court, under section 989 of the Revised Statutes, made substantially a recovery against the government, to be paid out of the treasury. All relationship between Seelye and his firm on one side and the government and its agents and officers on the other side ceased entirely when the firm was reimbursed by Harrison and the cotton was delivered to Harrison. The firm held the cotton, by authority of Flanders, as security for the charges which they paid by his order, and they held it as security also for their

storage charges. They parted with the cotton because all their claims against it were reimbursed, and with the closing of that transaction their agency, and that of Seelye as representing the government, or Flanders, in any capacity, in connection with the transaction, entirely ceased. Neither the firm nor Seelye had any such representative capacity in defending the suit brought by Harrison. There is not in the petition any allegation of any fact which tends to show that the government or Flanders is bound by the judgment in the suit brought by Harrison, nor is any such fact stated in the findings made by the Circuit Court. The petition merely alleges that all that Seelye did, and all that he was compelled to pay, was the direct result of the orders of Flanders, and that Flanders is bound to reimburse to him the amount so paid, either in direct obedience to his orders, or as the necessary result of that obedience. The payment of the Harrison judgment was, however, in no proper sense the result of any obedience to any order of Flanders. Not only is there not in the special findings any finding of any facts which tend to make the Harrison judgment of any binding or probative force as against Flanders, as a party or a privy to it, but the finding in regard to the Harrison bond is conclusive to show that no judgment in favor of Harrison against Seelye & Atwood can be used to aid in establishing the present claim against Flanders and the government, unless it appears affirmatively that they had notice of the Harrison suit and an opportunity to defend it. The answer of Flanders in the present suit alleges that the charges which he directed Seelye & Atwood to pay were legal charges on the cotton under the act of Congress referred to, and that they were refunded to them by Harrison "as an admitted claim." It also alleges that Seelye & Atwood, in their answer in the Harrison suit, averred that the charges which they paid were lawful charges on the cotton and were acquiesced in by Harrison and reimbursed to them. Proof of such admission of and acquiescence in the claim by Harrison was therefore admissible, and was made by proving that Harrison gave at the time the bond referred to.

In view of the provisions of that bond it is difficult to see why, as against Flanders, Harrison is not debarred from saying that he did not admit and acquiesce in the lawfulness and propriety of the charges which he paid to Seelye & Atwood. His bond was given to save harmless the government and the agents of the Treasury Department "on account of the seizure and detention of said cotton, and on account of any damages they might sustain by reason of said seizure." The charges reimbursed to Seelye & Atwood by Harrison grew directly out of the seizure and detention of the cotton, and any amount which might be paid on the recovery in the present suit would be covered by the terms of the bond. The bond covers not merely damages for taking and keeping the cotton, but the agreement is to hold the government and Flanders harmless on account of the seizure and detention. This covers the expenses attending the removal and keeping of the cotton. The act of 1863 expressly makes the expenses of transporting and disposing of captured property a charge upon its proceeds, even where a claimant establishes a right to such proceeds. In any event, therefore, before the recovery by Harrison against Seelye & Atwood can be made the foundation of a cause of action or a recovery by Seelye against Flanders, it must appear that he had a fair opportunity to set up, as against such recovery by Harrison, the said matters of defense to his claim. Proving in the present suit the giving of the bond by Harrison was proving that Flanders had a good defense to the suit brought by Harrison against Seelye. Such proof having been given, must be regarded as having been properly given under the answer. It was proof of the admission by Harrison of the claim of Seelye & Atwood as is alleged in the answer. It does not appear that Flanders had any notice of the Harrison suit, or any opportunity to make therein the defense referred to. It was necessary that it should so appear, the existence of such defense being established. It is not for Flanders to show that he had no notice by proving a negative.

Our attention has been called to the provisions of articles

378, 379, 382, and 388 of the Code of Practice of Louisiana, as having a bearing on this case. They are as follows:

"ART. 378. The obligation which one contracts to defend another in some action which may be instituted against him is termed warranty. The one who has contracted this obligation is called the warrantor.

"ART. 379. * * * * Personal warranty is that which takes place in personal actions; it arises from the obligation which one has contracted to pay the whole or a part of a debt due by another to a third person.

"ART. 382. The defendant wishing to call one in warranty may, in his answer, pray the court to decree against his warrantor the same judgment which may be rendered against him on the principal action; such prayer will be considered as a demand in warranty.

"ART. 388. The defendant, though he has not called his warrantor to defend the suit brought against him, does not lose on that account his action in warranty, unless the warrantor prove that he had means for defending the action which were not used owing to the defendant having failed to call him in warranty, or having neglected to apprise him of the suit having been brought."

In Sterling *v.* Fusilier, 7 Martin, 442, the Supreme Court of Louisiana, in reference to provisions of the civil code like those just cited, says that the neglect of a person sued in failing to call in his warrantor to defend the suit, has no other effect in a suit afterwards brought by such person against his warrantor than to cause the warranty to cease on proof in the latter suit that the warrantor had sufficient grounds or means of defense to have obtained a judgment in his favor, of which he could not avail himself for want of having been called on, and that that species of defense must be pleaded and proved. Assuming that Flanders was still a warrantor to Seelye & Atwood when the suit by Harrison against that firm was brought, we are of opinion, for the reasons before stated, that it appears in this case that Flanders had a sufficient de-

fense to have obtained a judgment in his favor if he had been called in warranty in the Harrison suit, or been notified of the bringing of that suit, and that he could not avail himself of that defense in the Harrison suit for the reason that he was not called in warranty or notified of the bringing of that suit. That defense is not only proved in this suit, but is sufficiently pleaded, as is before shown. There is nothing in article 388 of the code which requires Flanders to prove anything more than he has proved in this suit. The existence of the defense being proved, the presumption is that it would have been proved and availed of in the Harrison suit by Flanders if he had been called in warranty, or been notified of the bringing of the suit, and it is then for the plaintiff in this suit to rebut such presumption, which has not been done.

We are of opinion that the judgment of the Circuit Court must be reversed and the case be remanded to that court with directions to award a new trial.

REVERSED.

THOMAS P. LEATHERS AND MARY W. MEEHA, WIDOW OF ANTHONY PAULY, DECEASED, CLAIMANTS OF THE STEAMBOAT NATCHEZ, &C., v. HOPKINS C. BLESSING.

May 8, 1882.

A libel *in personam* for damages received by a person who had gone on board a vessel moored at a wharf for the purpose of ascertaining whether he had a consignment by such vessel, it being customary with the officers to allow parties to come on board for such purposes, and who had been injured by a bale of cotton being negligently allowed to fall on him, is a maritime tort, and cognizable in the admiralty.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

J. G. Carlisle, for appellants.

Durant & Hornor, for appellee.

Opinion of the court.

BLATCHFORD, J.—This is an appeal by the respondents in a suit in admiralty *in personam* from the decree therein. Leathers was the master of the steamboat Natchez, and he and the other respondent were the owners of that vessel. The suit was brought in the District Court to recover damages for personal injuries received by Blessing, the libelant, on board of that vessel, and he had a decree in that court against the respondents *in personam* and as owners of the vessel, and *in solido*, for $5,758.50, with five per cent. interest from judicial demand till paid, and costs of suit. The respondents appealed to the Circuit Court. That court found the following facts: "1. That on the 26th day of December, A. D. 1873, the defendant therein, Thomas P. Leathers, was the master, and he and Mary Meeha, wife of Anthony Pauly, were the owners of the steamboat Natchez. 2. That about 1 o'clock P. M. of said day the said steamboat Natchez was lying at the wharf on the Mississippi near the foot of Canal street, in the city of New Orleans, securely moored to said wharf, and with at least one of her gang-planks out and resting on the shore, which afforded ingress and egress between the lower deck of said steamboat and the wharf. 3. That on the day and at the hour above mentioned the said steamboat had recently arrived at the port of New Orleans from a trip up the Mississippi River, having on board a large number of bales of cotton, and that the trip of said steamboat was completed, but her cargo was still to be discharged. 4. That a part of said cargo of cotton was stowed on the forward deck several tiers high, and a passageway was left from the end of the gang-plank to the foot of the stairs. This passageway was covered with bales of cotton piled on the bridging, and persons on shore who desired to go to the cabin or office of the steamboat could only do so by going along this passageway to the stairs, and up the stairs to the cabin and office. 5. That after the landing of said boat, and after her gang-plank had been run ashore so that persons could go from shore to said steamboat, the libelant went on board said steamboat, along said gang-plank, with the purpose of

going up into her cabin or to her office. 6. That the master and officers of said steamboat were accustomed to permit persons expecting to find on said steamboat freight consigned to them, as soon as she had landed and her gang-plank was out, to go aboard of her to examine the manifest or transact any other business with her master or officers. 7. That the libelant had business on said steamboat when he went aboard of her as aforesaid; he was expecting a consignment of cotton seed by said steamboat, and went aboard to ascertain whether it had arrived. 8. That when libelant was going through said passageway, and when near the foot of the stairs on his way to the cabin or office of said steamboat, a bale of cotton fell from the upper part of said passageway against and upon the leg and ankle of libelant, causing a compound fracture of the bones of his ankle and leg. 9. That said bale of cotton was carelessly and negligently stowed, and was left in such a position that it was liable to fall upon persons going along said passageway to the foot of the stairs of said steamboat, and its position was known to the master of said steamboat. 10. That libelant was in no manner negligent or in fault whereby he contributed to his said injury. 11. That the fracture of libelant's leg and ankle was such as to render amputation of his leg necessary, and his leg had to be, and was, amputated in consequence of the injury sustained by him as aforesaid. 12. That at the time of his injury aforesaid the libelant was thirty-eight years of age, and was earning in his business—which was buying cotton-seed as agent for the Louisiana Oil Company—the sum of $750 per year. 13. That at the time of said injury the libelant was in good health, with a good character for sobriety and integrity. 14. That in consequence of the injury sustained by him as aforesaid the costs and expenses incurred by libelant for treatment, surgical services, and in and about his care and cure, amounted to the sum of seventeen hundred and seven dollars and fifty cents. 15. That the other damage resulting to libelant from said injury, consequent upon loss of time and the permanent disabil-

ity caused by the loss of his leg, amounted to the sum of four thousand dollars." As a conclusion of law from the foregoing facts the court found that the libelant ought to recover from the respondents the aggregate amount of said costs, expenses, and damage, with interest thereon, as additional damage, from the date of judicial demand, and it gave a decree in favor of libelant against the respondents for the said sum of $5,607.50, with interest at the rate of *five per centum per annum* from the date of judicial demand till paid, and costs of suit From that decree this appeal was taken by the respondents.

The only question raised by the appellants is as to whether the suit was one of admiralty jurisdiction in the District Court. They maintain that jurisdiction of the case belonged exclusively to a court of common law. Attention is directed to the facts that the Circuit Court did not find that the libelant was an officer, seaman, passenger, or freighter, or that he had any connection with the vessel, or any business upon her or about her, except that when he went on board of her he was expecting a consignment of cotton-seed by her, and went on board to ascertain whether such consignment had arrived; and that the vessel had fully completed her voyage and was securely moored at the wharf at the time the accident occurred. It is urged that the case is one of an injury received by a person not connected with the vessel or her navigation, through the carelessness or neglect of another person, and that the fact that the person guilty of negligence was at the time in control of a vessel which had been previously engaged in navigating waters within the jurisdiction of the admiralty courts of the United States cannot give jurisdiction to such courts.

Although a suit might have been brought in a common-law court for the cause of action sued on here, the District Court sitting in admiralty had jurisdiction of this suit. The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. There-

fore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts that she was securely moored to the wharf and that she had communication with the shore by a gang-plank did not make her a part of the land, or deprive her of the character of a water-borne vessel.

The findings state that the master and officers of the vessel were accustomed to permit persons expecting to find on the vessel freight consigned to them, as soon as she had landed and her gang-plank was out, to go on board of her to examine the manifest or transact any other business with her master or officers; that the libelant had business on her when he went on board of her under the circumstances set forth in the findings; that he was expecting a consignment of cotton-seed by her, and that he went on board to ascertain whether it had arrived. These findings show that not only did the libelant go on board for a purpose proper in itself, so far as he was concerned, but that he went substantially on the invitation of those in control of the vessel. It was not found that he knew of the custom referred to, but it is found that he was acting in accordance with such custom, and it is not found that he did not know of such custom. With the added fact that his business was that of buying cotton-seed, it is properly to be inferred that he went on board to inquire whether the vessel had brought the cotton-seed which he was expecting, because he knew of such custom. This makes the case one of invitation to the libelant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circumstances, the relation of the master and of his co-owner, through him, to the libelant, was such as to create a duty on them to see that the libelant was not injured by the negligence of the master. On the facts found there was a breach of that duty by the negligence of the master, constituting a maritime tort, of which the District Court had jurisdiction in this suit.

Syllabus.

Not only does the jurisdiction of courts of admiralty in matters of tort depend entirely on locality, but since the case of Waring *v.* Clark, 5 How., 441, the exception of *infra corpus comitatus* is not allowed to prevail. Nor is the term "tort," when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. (Phila., Wil. and Balt. R. R. Co. *v.* Phila. and Havre de Grace Steam Towboat Co., 23 How., 209, 214, 215.)

The decree of the Circuit Court is affirmed, with costs and interest on the principal sum of $5,707.50 decreed by the Circuit Court, to be computed at the rate of five per cent. per annum from the date of judicial demand in the District Court till paid.

AFFIRMED.

MADAM CELESTINE CARITE ET AL. v. MADAME FELICITE TROTOT.

May 8, 1882.

1. A seizure and sale by virtue of executory process under a mortgage, according to Louisiana practice, is not affected by the existence of subsequent mortgages the owners of which are not made parties, but vests the title in the purchaser at such sale, extinguishing the lien of the other mortgages and transferring it to the proceeds of sale.
2. An agreement by a mortgagee in advance of a sale to resell the property, in the event of his becoming the purchaser, to the wife of the mortgagor for an amount sufficient to pay the mortgage debt and costs, is not a fraud or injury to the other creditors of the mortgagor.
3. The failure to advertise the separation of the property of husband and wife, as required by article 2429 of the Louisiana Civil Code, does not render the judgment of separation void.
4. The requirement that the judgment of separation shall be executed, imposed by section 2428 of the Louisiana Civil Code, applies only to cases where the judgment requires the transfer of property or payment of money, and not to cases where the object is merely to protect future earnings of the wife from the husband's debts, and the only money decree is for costs; in which latter cases the exercise of the right is the only execution required.

5. The mere allegation of the embarrassed condition of the husband, or of his insolvency, is sufficient to support such a decree of separation of property under section 2425 of the Louisiana Civil Code.
6. The fact that the husband consented to the fixing and trial of the case does not avoid the decree of separation.
7. The fact that the suit involved no money claim did not deprive the Parish Court of jurisdiction.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Thomas J. Semmes, for appellant.

Joseph P. Hornor and *W. S. Benedict*, for appellee.

MATTHEWS, J.—This is a bill in equity filed by the appellee to foreclose a mortgage, and for the sale of the mortgaged property, consisting principally of a sugar plantation, with its improvements, in Louisiana. The property originally belonged to Jean Baptiste Clement, a citizen of France, who, and also his agent and attorney in fact, Antoine C. Tremoulet, by whom he was represented in the transactions in question, are parties to the suit, and appellants, with Madam Celestine Carite and her children. Clement, through Tremoulet, sold the property September 22, 1869, to the firm of Copponex & Co., composed of Copponex, Moulor, and Carite, the husband of Madam Celestine Carite, for $55,000, of which $10,000 was paid in cash, $6,764 was an incumbrance in favor of the Citizens' Bank of Louisiana, assumed by the purchasers, and the remainder evidenced by their four promissory notes for $9,559 each, payable respectively September 1, 1870, 1871, 1872, and 1873, with interest at eight per centum per annum, amounting to $38,236, was secured by mortgage upon the premises.

On January 11, 1871, Copponex sold his interest in the firm business and this property to his partners for $10,000 cash, they assuming the debts of the partnership, and on December 30, 1872, Moulor sold his interest to Carite for $55,000, in addition to the assumption by the latter of the incumbrance in

favor of the Citizens' Bank, amounting then to $5,573, and three unpaid notes of $9,559 each, with interest, still due to Tremoulet as agent for Clement. For the purchase-money, agreed to be paid to Moulor, Carite gave eleven promissory notes of $5,000 each, three payable in one year from date, two in two years, two in three years, two in four years, and two in five years, secured by mortgage upon the plantation.

The appellee claims to be the holder and owner of five of these notes, the first three and the second two, bearing interest at the rate of eight per cent. per annum, which being overdue and unpaid, she claims the right to foreclose the mortgage given by Carite to Moulor, and sell the mortgaged premises for the payment of the amount due thereon; and that her mortgage and the debt secured thereby is the first and best lien upon the mortgaged premises, except what may still appear to be due to the Citizens' Bank.

As the grounds of this priority, she alleges that on February 10, 1873, Casimir Carite, conspiring with his wife, Madam Celestine Carite, and Tremoulet, induced the latter to institute proceedings, by executory process, in the name of Clement, in the Circuit Court of the United States for the District of Louisiana, upon the mortgage and notes given by Copponex & Co., for the seizure and sale of the mortgaged premises, and caused the same to be sold to Tremoulet for a price less than the amount due to the Citizens' Bank, and the amount claimed to be due to Clement, and the title was conveyed to him accordingly; that said proceedings and sale were simulated and fraudulent, the possession of Casimir Carite not being disturbed thereby, and the object being to defraud the appellee and his other creditors; and that, in point of fact, the debt originally due from Copponex & Co. to Clement, secured by the mortgage to the latter, was at the date of said proceedings and sale paid and extinguished; that, in further prosecution of the same conspiracy and fraud, Casimir Carite induced and caused his wife on February 13, 1873, to file a petition in the Parish Court of St. James, in Louisiana, representing that she was married to

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Casimir Carite on April 23, 1863, and that there existed between them a community of acquests and gains, which allegations it is admitted were true, but further setting forth that her husband had become hopelessly involved in debt, which, it is alleged, was false, and prayed for a judgment of separation of property from her husband; that a pretended defense was made by Casimir Carite to his wife's petition, on which judgment was rendered in favor of the wife, separating her in property from him, and dissolving the community of acquests and gains theretofore existing between them; that this proceeding was fraudulent and void, because it was voluntary and by consent; because the wife had no claim against the husband and alleged none, and assigned no reason in law why such separation should be decreed; because there was no derangement of the affairs of the husband, and no allegation that the wife could conduct the business of the plantation better than her husband, the latter in point of fact having conducted the same after said decree, as before; and because said judgment was never published as required by law, nor ever executed in any manner by the issue of any writ of execution; that, in further pursuance of said conspiracy and fraud, Tremoulet, on May 22, 1873, pretending to act as agent for Clement, made a pretended sale to Madam Celestine Carite of the said plantation and property for a sum sufficient to cover the amount alleged to be due to Clement, although that debt, or a large part of it, had previously been satisfied and extinguished.

The prayer of the bill was that the proceedings under which Tremoulet purchased the premises for Clement, the decree of separation of property from her husband on behalf of Madam Carite, and the sale and conveyance to her of the plantation by Clement, be adjudged to be void and be set aside, and that the complainant's mortgage and debt be charged as the first lien on the same, and be satisfied by a sale thereof for that purpose.

The final decree of the Circuit Court was substantially in accordance with the prayer of the bill, declaring that the sale

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to Tremoulet for Clement, and by him to Madam Carite, be set aside and annulled as simulated and illegal; that the judgment of separation of property between Madam Carite and her husband is null and void for want of publication; that the plantation and property be recognized as belonging to the community formerly subsisting between Carite and his wife, as it did before said simulated sales were made; and that the plaintiff below had established the mortgage under which she claims as a valid and subsisting lien upon the property to secure the sum of $25,000, with interest at the rate of eight per cent per annum from December 30, 1872, for which, if not paid within sixty days, it was ordered that the premises be sold.

The object of the present appeal is to review this decree.

The first question it presents relates to the validity and effect of the judicial proceedings taken by Tremoulet, which resulted in the sale of the property to Clement.

Against its validity it is asserted in the bill of the appellee that the debt to Clement at the time of the sale had been extinguished, and that the proceeding, therefore, was a mere pretext and cover for an intended fraud. But the evidence leaves no doubt that this was an unfounded suspicion. It is abundantly established by the proof that at the time of the sale there was still due on account of the debt to the Citizens' Bank, assumed by Carite, $5,573, and that two of the notes for $9,559 each, on one of which interest was running from January 15, 1873, and on the other from its date, September 1, 1869, were overdue and unpaid; and that another note of the same series and of the same amount was held by Tremoulet for Clement, falling due September 1, 1873—the whole amounting to $34,395.40.

The proceeding itself, though summary, was familiar in practice in such cases and strictly according to the law of Louisiana, and, if not voidable on other grounds, had the effect to vest in Clement an absolute title to the property, free of all subsequent incumbrances. It was executory process which is authorized (Code of Practice, art. 732) "when the creditor's right arises

from an act importing a confession of judgment, and which contains privilege or mortgage in his favor;" which is the case (art. 733) "when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage." By article 3360, C. C., it is declared "that the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already acquired to another creditor;" so that a seizure and sale by virtue of executory process under a mortgage is not affected by the existence of subsequent mortgages the owners of which are not made parties to the proceeding. The security of the latter, in that event, is transferred to the proceeds of the sale, and their protection consists in the requirement that no sale shall take place for less than two-thirds of the value of the mortgaged property, as appraised for that purpose. This effect is expressly declared by Code of Practice, articles 707, 708. (Hart *v.* Foley, 1 Rob., 382.) It follows, therefore, that, unless the judicial sale to Clement is a nullity, the mortgage lien of the appellee is itself extinct, though the mortgage debt will survive as a personal obligation.

It is contended, however, by the appellee, that this sale to Clement was void, as a fraud upon her rights as a creditor of Carite, because, taken in connection with the subsequent sale to Madam Carite, it was intended to defeat the claims of the creditors of Carite, and to place this property beyond their reach.

The circumstances attending the transaction are these: Carite was undoubtedly insolvent. Two of the notes held by Tremoulet for Clement had become due and remained unpaid. He was in arrears on account of interest. He was embarrassed by other debts, for which he was pressed, so as seriously to threaten the uninterrupted prosecution of the business of the plantation. The notes were placed by Tremoulet in the hands of an attorney for collection. The neces-

sary formal preliminary demand of payment was made. A negotiation was begun by Carite for an extension of time, the latter suggesting that he could make such an arrangement with all his creditors. Tremoulet told him he had no desire to acquire the property, as he represented Clement, who resided in France, and who did not wish a sugar plantation, and would not know what to do with one if he had it; but that he would feel obliged to act upon his matured notes if the consequence of non-action was to be the seizure of the mortgaged property by other creditors, and the consequent diminution of the security. The upshot was a promise by Tremoulet to Carite to abstain from a seizure under the mortgage until Carite should have time to arrange with his creditors, provided no seizure was made by other parties.

What efforts Carite made to obtain from other creditors the desired indulgence do not appear, but if any were made they did not succeed. On February 7, 1873, Tremoulet, in a letter to Clement, reported that by an arrangement with Carite the latter would make no objection to the sale and seizure of the immovables, and would rather facilitate the execution thereof, on condition that Tremoulet would oblige himself, buying them in Clement's name, to resell the same to his wife, from whom he was separated in property, at a price that would cover all that was due to Clement, including interest, costs, and attorney's fees, provided that nobody should put in a higher bid than that amount, the accrued interest to be paid in cash. The terms, he added, were not then fixed, but might be soon, and said that he should not be too exacting, knowing that Carite continues the plantation at his own expense, that everything predicted a good crop, and, notwithstanding the depreciation in the value of real estate, the plantation was adequate security for the mortgage to Clement.

On February 10, 1873, Neal and McIntyre, citizens of Kentucky, commenced a proceeding in the Circuit Court for the sequestration of ten mules on the plantation, on which they claimed to have a lien and privilege as vendors, for the un-

paid purchase-money, amounting to $2,150, and a writ was accordingly issued, directed to the marshal, and requiring him to seize and take possession of them.

On the same day, in consequence of this proceeding, Tremoulet caused executory process to issue in behalf of Clement, and seized the mortgaged property, including the mules sought to be subjected to their writ by Neal and McIntyre, which were claimed as subject to the Clement mortgage, because they had become immovables by destination. The plantation and property were taken into possession by the marshal, though Carite was permitted to remain for the purpose of attending to the growing crop, and was advertised for sale. Mr. Edward D. White, Tremoulet's attorney, testified as follows:

"During the seizure and before the sale quite a number of the creditors of Moulor, Copponex & Co. and Carite called on me. To all of them I stated exactly what had been said to Carite; that is, that the seizure of the property had been provoked by the threatened removal of the immovables by destination; that the property was not desired by the plaintiff; that he had no intention of bidding on it beyond the amount of his claim, with costs and charges; that Carite had been told if he could successfully arrange with his creditors indulgence would be given and proceedings stopped."

On March 3 Tremoulet reported by letter to Clement the fact of seizure, and that the property was advertised for sale, saying: "I am waiting for Mr. Carite to make our arrangements for the sale that I shall make to his wife." The sale was had on April 5, and on April 10 Tremoulet reported that fact by letter to his principal, saying: "In case the plantation would have brought wherewith to cover your debt, capital and interest, it was understood that I would not buy the same in, but would receive the amount due you." * * * "Now, I am awaiting Mr. Carite to sell the plantation back to his wife on the terms agreed upon. It is well understood that you shall have to bear no costs, the sale having been

made only for the purpose of relieving the plantation from the embarrassments in which Moulor had placed it." He then proceeds to explain the reasons for the resale as proposed, and said: "Another important reason is, that I could not do you justice in charging myself with the administration of this property at the distance where I am." * * * "In one word, I preferred in your own interest to resell the plantation, taking all possible precautions, rather than to work the same for your account, notwithstanding the fine prospect of the present crop." On May 26 he reports the conclusion of his negotiations with Madam Carite and the resale to her, giving the details of the purchase. He says: "I have been obliged to accept from Mrs. Carite a smaller amount than the amount agreed upon in order to make the sale of the immovables, and this in your interest; it was preferable to accept these terms than to keep the plantation and work the same for your account at the present price of labor. In case I should have refused to effect an understanding with Mrs. Carite, I would not have found a purchaser that would have taken the plantation on the same terms."

We see nothing in the circumstances of the case as disclosed in this record to impeach the good faith or affect the validity of this transaction. Clement had the unquestionable right to subject the property, held as security for his debt, to judicial sale and become its purchaser at two-thirds of its appraised value. No one was wronged by such a procedure, although it had the effect to disappoint every other creditor. The sale was open and public, and there is no suggestion of any attempt to prevent the property from bringing the best price. Every subsequent incumbrancer had the right and the opportunity to bid upon it, and, if he chose, to buy it for himself. If he neglected or declined to do so, it must be assumed that he made his decision in the pursuit of his own interests. The title acquired by Clement was indefeasible and absolute. No right of redemption remained, and it was clothed with no trust. He could dispose of it at his own will. If he chose so to do, he

was entirely free to convey it, on any consideration he approved, to Madam Carite; as much so, if she was legally capable of receiving title, as to any other person. And what he could lawfully do with the property after it had become his own, he could agree to do in advance. In all this there is nothing whatever that touches the right of any creditor of Carite. It is a lawful end, pursued by lawful means; and if any loss has accrued to others by reason of it, it is because the property was not sufficient to pay all for which it had been pledged, or because those interested in the security voluntarily sacrificed their own interests. In neither event is there ground for complaint against others. The course of Tremoulet seems to have been dictated, as it was justified, by a wise regard to the interests of his absent principal. It was a mere measure of self-protection, to disembarrass the property of debt, to protect it against disorganization and waste, justly apprehended as the result of seizures of subsequent mortgagees and lien-holders, or which might have accrued, if Carite, driven to that necessity, had surrendered it to the delays and expenses of administration and sale in a court of bankruptcy. We cannot perceive, in the acquisition and disposition of the title by Clement, either an intention or a tendency to impede or defeat the just rights of the appellee, or any other of the creditors of Carite.

It is further contended, however, by the appellee, that the decree of separation of property between Carite and his wife is void; that the latter having no capacity, therefore, to receive and hold the title to this plantation as separate property, it inured to the community as before, and was replaced subject to the previously existing liens in their order. It is not conceded that this consequence would result if it should be adjudged that the community had not been interrupted, for it is claimed that the sale to Clement having necessarily destroyed the lien of all subsequent incumbrances, a conveyance to Carite himself, although it would have made the property liable to the pre-existing debts of the community, it could be subjected only by process, open to general creditors by means of judgment and

levy under executions. However this may be, we proceed to examine the grounds on which it is urged that the decree of separation of property rendered on the petition of Madam Carite should be annulled.

The first of these, and the one on which the Circuit Court based its decree, is that the judgment was never advertised, in violation of article 2429 of the Civil Code, which provides:

"The separation of property obtained by the wife must be published three times in the public newspapers, at the farthest within three months after the judgment which ordered the same."

The fact that no such publication was made is not denied, but its omission, it is insisted, does not avoid the judgment. And such is the construction put upon this article by the Supreme Court of Louisiana. In Turnbull *v.* Davis, 1 Martin, N. S., 569, that court said:

"It is true that by law publication of a separation of property between husband and wife is expressly required, but the pain of nullity is not denounced against a neglect of such publication. It is not a prohibitive regulation, which might, in some instances, imply nullity. We are, therefore, of opinion that a judgment of separation, unattended by publication, is not *ipso facto* void; but if such laches afford any ground for annulling and declaring it inefficient, it can only be decreed on showing fraud and injury to third parties as a consequence of omitting the publication. In the present case there is no positive testimony that the defendants have suffered injury, resulting from the neglect to publish the decree of separation; nor can such injury be legally presumed from the whole tenor of the evidence."

The authority of this case was recognized and the decision followed in Raiford *v.* Thorn, 15 La. Ann., 83, decided in 1860.

We have examined the cases of Spires *v.* McKelvey, 23 La. Ann., 571; Levistones *v.* Brady, 11 La. Ann., 697; Bostwick *v.* Gasquet, 11 La., 537; and Hayman *v.* The Sheriff, &c., 27 La. Ann., 195, to which we have been referred by counsel for

the appellee, and do not find in them anything which overrules the decisions cited above, or that is inconsistent with them.

It is next objected that the judgment of separation of property is null, because, in violation of article 2428 of the Civil Code, it was not executed. That article reads as follows:

"The separation of property, although decreed by a court of justice, is null if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can reach them, or at least by a *bona fide* non-interrupted suit to obtain payment."

It will be observed that the language of this article differs from that of article 2429, just considered, in expressly denouncing nullity as a consequence of non-compliance with its requirements. But the nature of the execution must have relation to the nature of the judgment, and the terms of the article manifestly refer to cases where the judgment involves the transfer of property or the payment of money, and not the mere question of the future status of the wife, and her right, independent of her husband, separately to acquire property in her own right. This is the view taken by the Supreme Court of Louisiana in the case of Jones *v.* Morgan, 6 La. Ann., 632, in which it is said that "the article of the code requiring execution to issue within a limited time after the decree of separation, under a pain of nullity, is only applicable to cases in which there is a judgment against the husband for a sum of money. This precaution is, no doubt, intended for the protection of those with whom the husband is in the habit of dealing. But in this case the object of the action was not to recover moneys of the wife; it was simply to put an end to the community, and then to secure to the wife and her children the future earnings she might derive from her untiring industry."

In such a case the intent and effect of the judgment is merely to confer a right upon the wife to act, in respect to her future acquisitions, the fruits of her own industry, and the savings of

her own economy, separate from her husband, as though she were sole; and the right becomes fixed and vested by its actual exercise. (Holmes *v.* Barbin, 13 La. Ann., 474.)

This is what is meant by what the Supreme Court of Louisiana say in Muse *v.* Yarborough, 11 La. Ann., 533, that "it is not the mere judgment of separation which renders the parties separate of property. The judgment recognizes the necessity for separation and judicially authorizes it; but if not followed by a *bona-fide* execution, it produces no effects, even between the parties."

It is only when the judgment of separation of property is founded on a cause which results in the establishment of some claim against the husband's estate susceptible of execution, by some authentic act, or by judicial process to enforce it, that a neglect or failure to insist upon its execution is deemed conclusive evidence that it is the intention of the parties not to dissolve the community. The law in such cases, for the protection of creditors otherwise liable to be misled, annuls the unexecuted judgment of separation. (Handy *v.* Sterling, 1 La. Ann., 308; Longino *v.* Blackstone, 4 La. Ann., 513; Succession of Hearing, 28 La. Ann., 151.)

The costs of the suit which Carite was condemned to pay can hardly be considered any part of the judgment of separation of property of which execution is required, and hence the failure to attempt their collection cannot affect its validity. In all other respects Madam Carite assumed and exercised the right conferred upon her by the judgment dissolving the community between her husband and herself by the very transaction in question, acquiring the title by purchase from the owner of a plantation which she has since administered, not less in the life-time of her husband than after his death, so far as the record discloses, in her own name and right, and has thus in the meaning of the law executed the judgment of separation.

It is next objected that this judgment is void for want of

any legal ground to justify it. The grounds on which it was prayed for in the wife's petition are thus stated:

"Petitioner further represents that, owing to a series of crushing misfortunes, her husband, who was heretofore possessed of considerable means and property, has lately become hopelessly involved in debt, for the satisfaction of which all his property is now being attached, seized, and disposed of by his numerous creditors. That all of her husband's property will not be sufficient to pay and satisfy the enormous debt which is due by him. That in consequence of the above-recited circumstances petitioner fears and believes that the earnings of her separate industry may be seized by her husband's creditors and thus be lost to herself and children; for which reasons petitioner is desirous of being separated in property from her said husband."

This petition was filed February 13, 1873. This was after the writ of sequestration issued by Neal and McIntyre had been executed, and after the seizure made by Tremoulet under his executory process in behalf of Clement.

Article 2425 of the Civil Code, which it is alleged regulates this proceeding, reads as follows:

"The wife may, during the marriage, petition against the husband for a separation of property whenever her dowry is in danger owing to the mismanagement of her husband or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

An authoritative construction of this article is found in Wolf *v.* Lowry, 10 La. Ann., 273. The court there say: "In Davoc *v.* Darcy, 6 Rob., 342, it was held that the right of the wife to a separation of property was not limited to the cases mentioned in article 2399 (now 2425) of the code, and that she might obtain a separation of property when the habits and circumstances of her husband rendered it necessary to preserve for her family the earnings from her industry or talents. The same question was afterwards decided in the case of Penn

v. Garland, 7 Ann., 343, when the right of the wife, which had been made the basis of the action of separation of property, was the value of a slave which had been given to the wife during marriage and had been alienated by the husband. The court reaffirmed the former decision, and held that in case of the derangement of the husband's affairs this was sufficient to authorize a judgment of separation of property in favor of the wife. After these repeated decisions we must consider the law as settled, the question being one of the construction of statutory laws, involving no fundamental principles."

This doctrine, that a claim for money or property on the part of the wife is not necessary to support a judgment of separation, was reaffirmed in Mock v. Kennedy, 11 La. Ann., 527, where the court say: "It is sufficient for a married woman to prove that she had the skill and industry to earn a separate livelihood, which she had exercised, whether as a seamstress, teacher, milliner, or (as in the case at bar) a shopkeeper, is not material; she is entitled under the humane spirit of our jurisprudence, upon proof of this fact accompanied by proof of the insolvent condition of her husband's affairs, to call upon the court, by a judgment of separation, to protect the fruits and earnings of her separate industry from being squandered by her husband or seized by his creditors."

In Webb v. Bell, 24 La. Ann., 75, a judgment of separation, on appeal, was affirmed, notwithstanding the petition of the wife was opposed by the husband on the ground that there was neither allegation nor proof that the plaintiff had, at the time of the institution of the suit, a separate trade or industry of any kind from which she was deriving revenue or means inuring to her own benefit. The sole ground of the judgment was the embarrassed circumstances of the husband's affairs. The court said: "The purpose sought by separation of property and dissolution of community in this case seems to be to enable the wife, by the use of her own limited means and those she might obtain through her relatives, to earn for herself

and child a support, without having her earnings fall into the community."

The same point was expressly decided in Meyer *v.* M. J. Smith & Co., 24 La. Ann., 153, where the only allegation in the petition, on which the judgment was based, was that, "owing to the insolvency of her husband, it becomes necessary for the preservation of her acquisitions, the education, maintenance, and support of herself and family, that a dissolution of the community, &c., be decreed."

It is also objected to the judgment of separation that it was by consent, and, therefore, null, as equivalent to a voluntary separation, made void by article 2427 of the Civil Code, and that it is not supported by evidence.

Both these objections are met by the case of Powlis *v.* Cook *et al.*, 28 La. Ann., 546. In that case, as in this, the husband consented that the case might be fixed and tried, but, as the court then said, "that did not make it a consent judgment." And as to the proof of the husband's insolvency, the court then say, what may be adopted here, it "is manifest from this litigation, if not otherwise shown."

It is also urged that the Parish Court had no jurisdiction to entertain a suit for separation of property. No adjudication to this effect by the Supreme Court of Louisiana is referred to by counsel; while, on the contrary, it is tacitly assumed to exist, in the case of Willis *v.* Ward, 30 La. Ann., 1282. Article 87 of the Constitution of the State of 1868, then in force, prescribes that Parish Courts "shall have exclusive jurisdiction in original suits in all cases where the amount in dispute exceeds one hundred dollars and does not exceed five hundred dollars." The only limitation of the jurisdiction is as to the amount of money involved in the controversy, and has no relation to the question where the suit is not prosecuted for the recovery of money, or money's worth.

It is finally urged that the property in controversy belongs to the community, notwithstanding the judgment of separation. But, on the admission of the validity of the sale to

Clement and of the judgment of separation of property, it is impossible to maintain this position; for, on that supposition, Clement had the right to dispose of the title to Madam Carite precisely as to any other person capable of purchasing. The sale was made on credit, except as to the small sum of $1,243.73, and it does not help the contention of the counsel for the appellee on this point to admit what he says, "that every cent that Mrs. Carite has paid on account of the purchase of the plantation was simply a part of the profits of the plantation itself;" because it is not claimed that any portion of those profits accrued prior to the time when all the interest which Carite, or any of his creditors, subsequent in right to Clement, ever had in the property, had been divested by the sale to him. Consequently it is fully shown that the community had no claim to any of the consideration paid by Madam Carite for her purchase.

Upon these grounds the Circuit Court should have dismissed the bill of the appellee for want of equity, and for this error the decree is reversed and the cause remanded with directions to render a decree dismissing the bill; and it is so ordered.

REVERSED.

BRIDGE, BEACH & COMPANY v. THE EXCELSIOR MANUFACTURING COMPANY, G. F. FILLEY, PRESIDENT, ET AL.

May 8, 1882.

It appearing from the evidence that automatic devices for raising shelves attached to stove-doors and closing them, and for producing simultaneous operations according to the wants of the case, have long been known, Bussey's patent No. 180,001 for an automatic device of that character, if valid at all, is only valid for that special device, and is not infringed by patents which accomplish the same purpose with a different device.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

Robert H. Parkinson, for appellants.

S. S. Boyd, for appellees.

BRADLEY, J.—This case arises upon a bill in equity founded upon certain letters-patent dated July 18, 1876, and numbered 180,001, granted to one Esek Bussey for an improvement in cooking-stoves. The appellants, as assignees of the patentee, sue the defendants for alleged infringement, and pray an injunction, an account of profits, and an assessment of damages. The defendants filed an answer denying infringement, and alleging the patent to be invalid by reason of certain prior patents and public use of the alleged invention prior to the invention of Bussey. The patent relates to an oven-shelf placed on a level with the bottom of the oven when the door is open, and outside of the oven, to serve as a shelf for pans and other vessels to rest on, when drawn out of or shoved into the oven. The claim of the patent is not for the shelf, as that is admitted to be old, but for an automatic device for raising the shelf upright and inclosing it within the door when the latter is closed, and letting it down to a horizontal position when the door is opened. The device is a cam attached to the door, which passes under the edge of the shelf and gradually raises it to a nearly perpendicular position as the door shuts. The shelf falls back of its own weight when the door opens, resting on the cam. The claim of the patent is as follows:

"What I claim, and desire to secure by letters-patent, is—

"In combination with a stove-oven, a hinged shelf, fitted to fall outward and down automatically when the oven-door is opened, and to be raised up by closing the oven-door, adapted to operate upon it for that purpose substantially in the manner and for the purposes herein set forth."

The defendants made and sold stoves containing oven-shelves constructed and operated as described in letters-patent granted to E. C. Little and D. H. Nation, dated July 9, 1878, and numbered 205,754. This shelf also has an automatic move-

ment, being raised when the door shuts, and lowered when it opens. But the device by which this is accomplished is different from that of Bussey. A cam, or arm, is used on the door, it is true; but it does not operate under the shelf, but upon a projection attached to the upper side of it, so arranged in relation to the arm on the door as to raise and lower the shelf. Both devices operate upon the same principle precisely as that which has been used for a long time in raising and lowering a carriage-step by shutting and opening the door, and in other contrivances by which the same general effect is produced. Cam movements, and others of like character, producing simultaneous operations according to the needs of the case, such as opening valves in a steam engine as the piston ascends and descends, and a thousand other things, are in such common use that it requires but very little invention to adapt them to a particular case, like the one under consideration. We think, with the court below, that the patentee, if entitled to anything, is only entitled to the precise device which he has described and claimed in his patent; and as the defendants use a different device, they are not guilty of infringement.

The decree of the Circuit Court is affirmed.

AFFIRMED.

EX PARTE SAMUEL FLOYD HOARD AND THE CEREDO CEMETERY ASSOCIATION.

May 8, 1882.

Mandamus will not lie to compel an inferior court to remand a cause after it has once overruled a motion to remand, even though the amount involved be not sufficient for an appeal.

PETITION for mandamus.

J. Holdsworth Gordon, for petitioners.

William J. Robertson, for respondents.

Opinion of the court.

WAITE, C. J.—The Chesapeake and Ohio Railroad Company began a suit in a State court of West Virginia to appropriate lands for the use of its road. To this suit the present petitioners, with others, were parties. The company, at a certain stage of the proceedings, filed a petition in the State court, under the act of March 3, 1875, ch. 137, 1 Sup. Rev. Stat., 173, for the removal of the suit to the District Court of the United States for the District of West Virginia, having Circuit Court powers. After the petition was filed and security given according to the requirements of the law, a copy of the record of the suit in the State court was filed in the District Court, and the case docketed there. This being done, the present petitioners moved the District Court to remand the cause, and strike it from the docket as to them and each of them. The motion having been argued and considered, was denied. The petitioners now ask this court for a writ of mandamus requiring the District Court to grant their motion.

Before the act of 1875, it was held in Insurance Company *v.* Comstock, 16 Wall., 270, followed in Railroad Co. *v.* Wiswall, 23 Wall., 508, that if a Circuit Court refused to take jurisdiction of a suit which had been properly removed, the remedy was by mandamus from this court "to compel the Circuit Court to proceed to a final judgment or decree," and not by writ of error or appeal. This was on the authority of *ex parte* Bradstreet, 7 Pet., 647, in which Chief Justice Marshall delivered the opinion. No case can be found, however, in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final judgment or decree from which ordinarily an appeal or writ of error can be taken; and Chief Justice Marshall, in *ex parte* Bradstreet, gave as the reason for allowing the mandamus, "that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of two thousand dollars," now, of

course, five thousand. If the cause is retained, it may go to final judgment or decree and the reason assigned for the mandamus in case of dismissal does not exist. If improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in Baltimore and Ohio R. R. Co. *v.* Koontz. It is of no importance that the value of the matter in dispute may be less than five thousand dollars. Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded. The act of 1875 has given an appeal or writ of error to this court for the review of orders to remand, without regard to the amount involved. (Babbitt *v.* Clark, 103 U. S., 606.) The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final. (*Ex parte* Detroit Ferry Company, decided at this term.) It is an elementary principle that a mandamus cannot be used to perform the office of an appeal or a writ of error. (*Ex parte* Loring, 94 U. S., 419.)

Without determining, therefore, whether the case was properly removed or not, the writ is denied.

DENIED.

THE CITY OF NEW ORLEANS v. JOHN A. MORRIS, FREEMAN CLARK, CHARLES F. HOWARD, JOHN KLEIN, AND JACK WHARTON.

May 8, 1882.

1. Although in general the proper remedy for a wrongful levy on property not subject to the levy is a motion to discharge the levy, yet where equity has jurisdiction on the ground of a trust, the same bill may invoke the restraining power of the court to prevent a sale under the levy.
2. A State statute which, in authorizing a city to convert its ownership of

a valuable property held for the use of the public into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, does not impair the obligation of contracts, the property so converted having been equally exempt.

3. The water-works of a city are of such public utility and necessity that they are exempt from sale for the debts of the city.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

E. Howard McCaleb, for appellant.

John A. Campbell, *W. W. Howe*, and *Albert Voorhies*, for appellees.

MILLER, J.—This is an appeal from a decree of the Circuit Court for the District of Louisiana dismissing appellant's bill.

The case was heard on a plea of the defendants, which being held to be good, the bill was dismissed.

The substance of the bill is that the defendants having several judgments on the law side of the Circuit Court, had caused executions issued on these judgments to be levied upon shares of the stock of the New Orleans Water-works Company, and the marshal had advertised them for sale and was about to sell them to the highest bidder; that prior to March 31, 1877, the city was the sole and absolute owner of the water-works now owned and held by the corporation known as the New Orleans Water-works Company; that on that day the Legislature of New Orleans enacted a law creating that corporation, with a capital of two millions of dollars. Of this sum the corporation, as soon as organized, was to "issue to the city of New Orleans stock to the amount of $606,600, full paid and not subject to assessment, and in addition thereto one similar share for every hundred dollars of water-works bonds which the city has taken up heretofore and extinguished by payment, exchange, or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of water-works bonds, to the extent of the amount

now outstanding, who may elect to avail themselves of the provisions of this act."

The bonds here referred to were those issued by the city, while sole owner of the water-works, in aid of their construction and extension.

The seventh section of this act reads as follows: "*Be it further enacted*, That the stock owned by the city of New Orleans in said water-works company shall not be liable to seizure for the debts of said city."

It was under this statute, and especially under the section just recited, that the city invoked the restraining power of the court to prevent the sale of its stock in the company.

To this bill the defendants interposed a plea to the effect that, so far as the provision of the statute exempting the stock of the city in the water-works company from sale under execution relates to their judgments, it is void by the provisions of the Constitution of Louisiana and of the United States, which forbid the enactment of laws impairing the obligation of contracts; and in their plea they show that the obligations on which their judgments were obtained against the city were existing contracts before the passage of the act of 1877.

As we have already said, the court held this plea good, refused the injunction, and dismissed the bill.

The first point raised in argument here which requires our attention is that, whether the court below was right or wrong in its decision of the case on its merits, the bill must still be dismissed for want of equity, on the ground that there is ample remedy at law by a motion to the court to compel the marshal to release his levy on the stock, because not liable to be sold on the execution.

It will be observed that no such objection was made to the bill in the court below, and although one of the defendants filed a general demurrer to the bill which might have raised it, he afterwards withdrew his demurrer and joined in the plea on which the case was decided.

This plea was a defense on the merits of the case, and was

to be held good or bad on precisely the same principles, whether pleaded to a declaration at law or a bill in chancery. We should, under such circumstances, have great hesitation to permit the party who had, by tendering this issue, waived the question of the special jurisdiction of the court in equity, to raise that point for the first time in this court on appeal.

We are of opinion, however, that the bill does show on its face a sufficient ground of equitable jurisdiction in the allegations found in the bill, sustained by the provisions of the statute, which creates a trust in favor of the holders of the old water-works bonds of the city, and of other creditors of the city, which is not shown in any way to have been released or discharged.

Notwithstanding, therefore, the opinion of this court in the case of Van Norden *v.* Morton, Bliss & Co., 99 U. S. R., 378, that in the ordinary case of a wrongful levy of an execution on property not subject to be seized under it the proper remedy is by motion to the court to have the levy discharged, we think there is in this bill other sufficient grounds for the equitable jurisdiction of the court.

The question to be decided on the merits is, shortly, this: Is a statute of a State Legislature which, in the act authorizing a city to convert its ownership of a large and valuable property, held for the use of the public, such as this, into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, an impairment of the obligation of existing contracts within the meaning of the Constitution?

The learned counsel, in the oral argument and in the brief, substantially concedes that the water-works themselves, in the hands of the city, were not liable to be sold for the debts of the city. And if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens. In this respect they were the same as public parks and build-

ings, and were not liable to sale under execution for ordinary debts against the city.

There is nothing in the nature of this legislation which directly impairs the obligation of the city's contract with the appellees. The courts recognized the binding force of those contracts by rendering judgments against the city after the passage of the act complained of just as they would before, and there is no pretense but that the moral or legal obligation of the city to pay those judgments remains undiminished.

The force of the argument for holding the statute void rests on certain decisions of this and other courts in regard to laws which attempted to exempt from the liability to seizure under execution property which, at the time the contract was made, was by law so liable to be seized and sold in enforcement of the contract. The cases of most importance so relied on are Green *v.* Biddle, 8 Wheaton, 1; Bronson *v.* Kinzie, 1 How., 311; McCracken *v.* Haywood, 2 How., 608.

But these cases do not go so far as the argument in this case requires. Indeed they fall far short of it. They simply hold that an act of the Legislature, passed after a contract is made, which withdraws property then liable to be seized and sold, in enforcement of that contract, from the power of the courts to seize and sell it, impairs the obligation of the contract. But it has never been held, so far as we are advised, that a statute dealing with property *not* subject to sale for enforcement of the contract, cannot, in providing for a change of the form of the title by which the debtor holds it, continue the exemption from forced sale of that which represents in the hands of the same owner the property so exempt. That is the case before us.

The water-works were not liable to execution for judgments against the city. The Legislature intended to change the form of the city's ownership of that property into that of shares of the capital stock of a company, of which it was at first to be sole owner. These shares represented the water-works of the city. They represented nothing else. The city owned the shares, and the Legislature continued in this property, in the

hands of the city as shares of stock, the same exemption which belonged to the property represented by these shares. In doing this no right of the creditors, at the time they made their contract or the passage of the act, was impaired. No property to which they then had a right to look for payment of their debt, or as a means of enforcing their contract, has been withdrawn from the force of its obligation. They are placed by this law in no worse condition than they were before.

They were not obstructed or impaired in the exercise of any remedy which they had when the contract was made. Nothing subject to their debt—not by way of lien, for such debts created no lien, but subject to execution after it might be issued—was withdrawn from that subjection. The shares were evidence of title in property which had never been liable to execution, and the statute continued this exemption in the ownership of these shares so long as it remained in the city.

But it is said that a creditor has, by his contract, the same right to enforce its performance out of property acquired after his debt is created as he had against that which the debtor owned when the contract was made. In a general sense there can be no doubt of the truth of this proposition. But there are two answers to it in the present case. In the first place, the property in question is not other and different property from that held and owned by the city at the time of the contract, and which was then exempt from execution. It has only changed the form and evidence of ownership. The shares represent in the hands of the city the same interest which it had before in the water-works.

In the next place, the city was not situated, as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The city could not have sold this property as the law stood. It could not have put it into a joint-stock company without the aid of a new law. The Legislature, in authorizing the change in the form of the ownership of the water-works, could, since it injured nobody and invaded no one's rights, say, as to the city, whether it be called new

property or not, that such ownership should continue exempt from execution.

As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of appellees, the Legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts.

We are of opinion, therefore, that the plea of defendants was bad; and the decree of the Circuit Court is therefore reversed, with directions to overrule the plea, and for such further proceedings as are not inconsistent with this opinion.

REVERSED.

THE UNITED STATES v. WILLIAM SMITH.

May 8, 1882.

The limitation of six years imposed by section 1069 of the Revised Statutes of the United States on bringing suits in the Court of Claims applies to an action brought by a paymaster in the army to establish a right to relief for money stolen from him, where it appears that he had paid up the money and that the government had always refused to allow his claim; such a case being materially different from that of United States *v.* Clark, 96 U. S., 37.

APPEAL from the Court of Claims.

S. F. Phillips, Solicitor-General, for appellants.

Sanborn & King, for appellee.

MILLER, J.—This was an action in the Court of Claims, under the third clause of section 105 and section 1062 of the Revised Statutes, to establish a right to relief for money stolen from claimant as paymaster in the army. The case turned in the court below, as it does here, on the question of the applicability of the statute of limitations as found in section 1069, and claimant relies upon the opinion of this court in United States *v.* Clark, 96 U. S. R., 37.

The case before us differs materially from the one there decided. In that case the United States were suing Clark in a court of general jurisdiction on his bond to recover the sum stolen from him by a robbery, which he had refused to pay, and had never paid or accounted for, and he sued in the Court of Claims to establish that set-off. In the present case the sum in controversy had been paid by the claimant to the proper officer, and the United States had no claim on him for it, and no right of action against him on that account. If the United States, in any action brought against Smith on his official bond, should include the sum now in controversy, it would be a perfect answer to the demand that Clark had paid it to his chief paymaster under order of Paymaster-General Brice, their common superior.

And if Smith should, in his account with the government, fall behind so that a balance as large as the sum now in controversy was due, and there had been a change of sureties on the bond, those who were sureties when this payment was made could insist on that sum being applied to their exoneration *pro tanto*.

Nor does it appear that there was any balance of money of the government in the hands of Smith at the time he brought suit, or when he obtained judgment, on which it could be applied as a credit.

It is, therefore, a case in which the judgment amounts to a recovery of the sum once paid by claimant, and as the statute gives no authority to make this effectual by repayment out of the treasury, it is to be collected by permitting him to retain it out of a future balance in his hands.

In Clark's case the money had never been paid by him to the treasury, nor did it appear that there had been any final refusal by the accounting officers of the treasury to allow the claim.

The reasons why this court held that the statute of limitations which applies to actions in general in the Court of Claims, of six years, did not apply to Clark's action, have direct rela-

tion to the differences we have noticed between that case and this. The court there said that until the accounting officers had refused to allow the claim in his accounts there was no occasion to establish it in the Court of Claims. There being no denial of his right, the statute did not run. This was founded on the conditions of the officer's bond to pay when demanded.

It sufficiently appears in this case that claimant's right was authoritatively denied when he was ordered by the paymaster-general to pay the money, and that then was the proper time to apply for the protection of the Court of Claims by asking its decree that he should be credited on his account with that sum.

The court in Clark's case gave as another reason why the statute did not apply, that, so long as the United States could sue for this money and did not do so, the right of claimant to this defense to that action could not be barred by the statute of limitations. And as Clark was then sued for that money by the government in a court where the defense could not be tried, but where it would not be barred by the limitation, if the court had had jurisdiction to hear the defense, it was not barred in the only court which had jurisdiction to establish the defense.

In the present case, the money having been paid by the officer, he was liable to no action by the government to recover it.

It cannot be permitted that, the initiative in regard to a judicial determination of his right remaining solely with him, he can claim to be free from the law of limitation governing actions in that court as long as he chooses. Nor can he, without regard to the statute of limitation, proceed to obtain a judgment which is in effect for the repayment of money had and received to his use by the government.

We think the action in this case is barred by the statute of limitations, and the judgment of the Court of Claims is reversed.

REVERSED.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY *v.* THE BOARD OF TRUSTEES OF THE TOWN OF CATLETTSBURG, KENTUCKY.

May 8, 1882.

1. A city ordinance imposing a rate of charge on vessels landing at wharves owned by the city, graded according to their tonnage, and also a penalty for landing anywhere else than at such wharves, is neither a tax in a general sense, nor a tax on tonnage in the meaning of the United States Constitution.
2. A city, if allowed by its charter, has a right to build such wharves and charge for their use, and also to prescribe where vessels shall land and discharge cargo; and the exercise of such right, if a regulation of commerce at all, is valid as long as Congress fails to make any provision on the subject.
3. Although relief might probably be given against an oppressive abuse in the exercise of such right and in the rates of wharfage charged, yet the facts alleged in the case at bar do not prove that the rates in question are excessive.

ERROR to the Circuit Court of the United States for the District of Kentucky.

David Stuart Hounshell, for appellant.

No counsel for appellees.

MILLER, J.—This is an appeal from a decree of the Circuit Court for the District of Kentucky dismissing appellant's bill on demurrer.

The bill is very inartificially drawn, and the allegations very imperfectly present some of the questions which, by the brief of counsel, it is supposed to have raised.

It alleges the complainant to be a corporation owning a large number of steamboats engaged in the navigation of the Ohio River and making frequent landings at the public wharf of the town of Catlettsburg, on the Kentucky side of that river. That upon each of said landings they were subjected to an illegal tax proportioned to the tonnage of each of said boats, amounting, between January 1, 1870, and April 30,

1877, to an aggregate sum of $5,092. Parts of the ordinance of the town under which this tax was collected, and of the statute of Kentucky supposed to authorize the ordinance, are set out in the bill. This ordinance is alleged to be void as being a duty on tonnage forbidden by section 10 of the first article of the Constitution, and also a regulation of commerce.

It is then alleged that the taxes so imposed are excessive and beyond all reasonable charges for the use of the wharf by the boats of complainant, and that the amount already collected for the use of said wharf exceeds the cost of erection and construction of the same.

An amended bill was also filed, which does not materially affect the matters in issue.

The thirty-first section of the act of the Kentucky Legislature of January 28, 1868, incorporating the town of Catlettsburg, authorizes the board of trustees "to erect, make, and repair wharves and docks, and to regulate and fix the rate of wharfage thereat; to regulate the stationing or anchoring of vessels or boats or rafts within the town limits, and the depositing freight or lumber on the public wharves."

The ordinances of the town complained of are the following, enacted February 23, 1871:

"The following rates are established as charges upon steamboats and other water-crafts landing at the public landing of Catlettsburg, Kentucky: On transient steamboats, $1 for every landing; on the largest sized regular packets, over 100 tons custom-house measure, $1 for each landing, and on all steamboats under 100 tons burden, 50 cents for each landing; for all store-boats or trading-boats, $1 for each landing, and if they remain more than one day, 50 cents per day for each day they remain; and for each wharf-boat used for the purpose of wharfage and commission, $10 per month."

And another, adopted by said board of trustees May 5, 1873, in the following words:

"That the public landing on the Ohio River between Division and Main streets is hereby appointed and established

as a steamboat landing, and all steamboats arriving at the town of Catlettsburg shall land at the wharf situate as aforesaid between Division street and Main street, and at no other point within the corporate limits of the town of Catlettsburg, except by the written consent of the wharfmaster of said town.

"That for any violation of the foregoing section the owners, controllers, or masters of any boat so violating shall be jointly and severally liable to pay a fine of $10 for each offense, which may be recovered by warrant in the name of the Commonwealth of Kentucky for the use of the board of trustees of the town of Catlettsburg.

"It is hereby made the duty of the wharfmaster to enforce this ordinance and to report and prosecute all violations thereof."

The prayer of the bill is for an injunction restraining the defendants from the collection of all taxes from orator's boats while landing at the natural and unimproved shore of the Ohio River, and at points other than the improved landing of the defendants between Division and Main streets, and from the collection of all excessive taxes while landing at *any* point within the corporate limits, and from the enforcement of the ordinance requiring them to land at the defendants' improved wharf between Division and Main streets, and the original bill prayed a decree for the sums improperly exacted of complainant.

The court below held, on demurrer to the original bill, that there could be no recovery in this suit for the amount illegally exacted and paid, because an action at law was the appropriate and adequate remedy for that purpose; and in that the court was probably right.

If, however, the bill presents no ground for the injunction prayed, the prayer for recovery of a moneyed decree becomes immaterial.

The framer of the bill seems to have labored under a misapprehension of the nature of the transaction in calling the demands made of the complainant taxes. We can see nothing

in the ordinances intended to impose a tax upon anybody. The bill, as we have said, is not very clear in its statements of the manner in which this money was paid or collected. It must, however, have been paid for the use of defendants' wharf or improved landing place, in which case it is complained of as an excessive charge, or it must have been paid as a penalty for landing at other points than between Division and Main streets in violation of the ordinance. In neither case is there anything in the nature of a tax.

The effort of the pleader undoubtedly is to bring the case within the constitutional prohibition of a tax upon tonnage.

If, however, the trustees of the town had a right to compensation for the use of the improved landing or wharf which they had made, it is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle, after the decisions we have made, to call this a tax upon tonnage. (Cannon *v.* New Orleans, 20 Wall., 597; Packet Co. *v.* St. Louis, 100 U. S. R., 428; Same *v.* Keokuk, 95 U. S. R., 80; Guy *v.* Baltimore, 100 U. S. R., 442.)

Still less ground exists for holding that the penalties imposed for a refusal to obey the rules for places of landing, and the orders of the wharfmaster on that subject, are taxes on tonnage.

Nor is there any room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and that this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce. (See cases above cited.)

There remains to be considered the validity of the ordinance which forbids the landing of vessels, except by the permission of the wharfmaster, at any other point within the town than

between Division and Main streets, and the question of excessive charges for the use of the wharf.

There can be no doubt that the rules which govern the landing and departure of vessels at points situated on navigable waters may seriously affect them in their business of navigation and transportation, and in some sense such rules are regulations of commerce.

On the other hand, the necessity is obvious of the existence in each port, where vessels as large as steamboats land at the shore and deposit their cargoes on the banks of navigable streams, of some authority to prescribe the places where this may be done, the time of doing it, and the points at which they may discharge cargo, both as relates to the streets, shores, houses of the town, and other vessels landing at the same time.

The protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the waters, made by the landing of large steamers, demand that such regulations should exist.

Small vessels without steam, rafts, flat-boats, keel-boats, loaded to their very utmost capacity, and liable to be sunk by the waves which accompany the landing of large steamboats, have the same right to land at the shore that steamers have, and they have a right to protection against their powerful competitors for trade. This can best be secured by appropriate regulations prescribing places for the landing of each, and in some instances placing the matter under the control of a wharfmaster or other officer, whose duty it shall be to look after it.

Such rules and regulations and such an officer exist in every place where the number of the inhabitants or the amount of the water-borne commerce justifies or requires it. The necessity for the existence of this power cannot be doubted.

We are not aware that in any instance Congress has attempted to exercise it. If it be a regulation of commerce under the power conferred on Congress by the Constitution, that body

has signally failed to provide any such regulation. It belongs, also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so. (Cooley *v.* Board of Wardens, 12 How., 237; Gilman *v.* Philadelphia, 3 Wall., 727; Crandall *v.* Nevada, 6 Wall., 42; Pound *v.* Turck, 95 U. S. R., 462.)

There is probably not a city or large town in the United States, situated on a navigable water, where ordinances, rules, and regulations like those of the town of Catlettsburg are not made and imposed by authority derived from State legislation, and the long acquiescence in this exercise of the power and its absolute necessity are arguments almosts conclusive in favor of its rightful existence.

We are of opinion that there is nothing in the ordinances of the town of Catlettsburg complained of, authorized as they clearly are by the statute of Kentucky, which is repugnant to the Constitution of the United States.

But while the authority to make such regulations may exist in the trustees of that town, it must be conceded that an oppressive abuse in the exercise of that power may present a case in which the proper court could give relief. If, for instance, while forbidding all boats to land elsewhere than at a designated and limited part of the shore, that space was too small to permit the landing at the same time of vessels whose business required it; or if, having assumed the obligation of providing appropriate and sufficient wharf accommodations and forbidden boats to land at any other place, there was in fact no proper landing place provided, a court would find some remedy for such oppressive and arbitrary conduct.

But nothing in this bill implies that the landing place pointed out by the ordinance is insufficient in dimensions or want-

ing in proper means of accommodating the business of the vessels using it.

So, also, while the statute authorizes them to establish the rates of wharfage, if the sum demanded for that service is so far beyond a reasonable compensation for the use of the city's wharf as to be oppressive and an abuse of the power thus conferred, the courts could in some way give appropriate relief, and it is this part of appellant's case which presents the only difficult question for our consideration.

We do not feel justified, however, on the allegations of this bill, in reversing the order of the Circuit Court sustaining a demurrer to it, for several reasons.

In the first place the bill is manifestly founded on the idea of the unconstitutionality of these ordinances, and an injunction is asked to restrain defendants from interfering with the landing anywhere within the city limits of appellant's boats, and in general from enforcing the obnoxious ordinances. There is, it is true, a prayer to restrain them from the collection of all *excessive taxes* while their boats are landing within the corporate limits, but what is excessive or what reasonable is not shown, and, as we have already said, the money collected is not taxes in any sense whatever.

In the next place the bill does not show how or why the sums paid for the use of the wharf, or for landing at other places, is excessive. The one reason for so charging which is given is evidently fallacious, namely, that the town has already raised enough money from the use of the wharf to pay for its construction and preservation.

The compensation which either the city or private owner of a wharf is entitled to receive is not to be based exclusively on a reimbursement of the costs of the wharf, and no such criterion can govern in the matter.

The ordinance establishing these rates and penalties is given in the bill and has been copied in the opinion, and it is by no means apparent that they are excessive. When it is considered that the wharf needs constant repair and care; that the com-

pensation of a wharfmaster, who must be always ready to locate the vessels and collect the charges, is to be paid; and that the character and nature of the improvement is not shown, it would seem that something more than characterizing those rates as excessive is needed to invoke the restraining power of a court of equity. It is not alleged that they are oppressive, or an abuse of the power confided to the trustees. No statement is made of what would be reasonable in the premises, and, consistently with the bill, the charge may be so little in excess of a just compensation as not to call for equitable relief.

There is no hinderance to trying this question in an action at law, where the verdict of a jury or the judgment of the court in one or two cases would establish what is reasonable under the circumstances, and this being once established by the appropriate tribunal, the court of equity could restrain the excess.

We concur with the circuit judge, that no such case of oppressive use or clear abuse of the power properly conferred on the trustees in regard to wharfage charges is alleged by this bill as to justify the interposition of a court of equity.

The decree dismissing the bill is therefore affirmed.

AFFIRMED.

AUSTIN CORBIN, G. S. C. DOW, THE NEW YORK AND MANHATTAN BEACH RAILWAY COMPANY, SAMUEL KEEFER, HENRY MCKINNIE, AND UZZIAH C. BURNAP v. CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT.

May 8, 1882.

A suit to recover possession of land and damages for detention in which the real parties interested are citizens of the same State, and those defendants who are citizens of different States from the plaintiffs are liable for damages for detention only jointly with the other defendants, and liable, if at all, only in the event of the plaintiffs establishing their title against the other defendants, cannot be removed by such non-resident defendants into the Federal court under the act of March 3, 1875.

Opinion of the court.

ERROR to the Circuit Court of the United States for the Eastern District of New York.

Randall Hagner, for plaintiffs in error.

J. J. McElhone and *Joseph K. McCammon*, for defendants in error.

WAITE, C. J.—This was a suit begun in a State court of New York by the Van Brunts, defendants in error, citizens of New York, against Corbin, Dow, and Burnap, also citizens of New York; the New York and Manhattan Beach Railway Company, a New York corporation; Keefer, a citizen of Ohio, and McKinnie, a citizen of Indiana, to recover the possession of certain lands, and damages for the detention thereof. The complaint alleges title in the Van Brunts, and an unlawful withholding of possession by all the defendants, who are now plaintiffs in error. Each of the defendants answered separately. The answer of Dow is a general denial of all the allegations of the complaint. The other defendants deny the title of the Van Brunts, and allege that the railway company is in possession. The railway company, Keefer, McKinnie, and Burnap set up title and seizin in fee in the company, and deny explicitly that either Keefer, McKinnie, or Burnap is in possession. After the answers were all in, the defendants united in a petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of New York, which was the proper district, on the ground "that there is a controversy herein which is wholly between citizens of different States, and which can be fully determined as between them."

The suit having been docketed in the Circuit Court, the Van Brunts moved to remand. The motion was granted, and from the order to that effect this writ of error was brought.

The real controversy is about the right to the possession of the land in dispute. So far as the title is concerned, it is apparent from the pleadings that citizens of New York are the only parties interested. They occupy both sides of that part of the

controversy. The citizen of Ohio and the citizen of Indiana claim for themselves neither title nor possession. It is true that, as the case stands, if the Van Brunts establish their title against the other defendants, and it appears that Keefer and McKinnie were actually in possession and wrongfully kept the rightful owners out, there may be a recovery against them jointly with the railway company of damages for the detention. But there can be none separately, because the company admits a possession which, if the Van Brunts have title, cannot be maintained. There is neither in the complaint nor the answers any claim of separate right, either to the possession or the property. The whole case depends on the question of title between the Van Brunts on one side and the New York defendants on the other. This controversy was not removable. That of the other defendants is a mere adjunct of the principal dispute. It cannot exist separately.

The case is therefore within the principle of The Removal Cases, 100 U. S., 457, decided after the order was made which is now under review. (Blake *v.* McKim, 103 U. S., 336, and Hyde *v.* Ruble, decided at the present term.) In no just sense can it be said that the pleadings present separate controversies, such as admit of separate and distinct trials. If they do not, there could be no removal under the second clause of the act of 1875 any more than under the first.

The order to remand is affirmed. AFFIRMED.

EX PARTE JOHN A. MASON.

May 8, 1882.

1. Under the sixty-second article of war a court-martial, even in times of peace, has jurisdiction to try a soldier for an assault with intent to kill a prisoner confined in a jail over which he was at the time standing guard, such a crime being clearly to the prejudice of good order and military discipline.
2. The fifty-eighth and fifty-ninth articles of war do not apply to such a case, it being in time of peace, and the application for the surrender

of the offender to the civil authorities, mentioned in the fifty-ninth article, not having been made.

3. The ninety-seventh article of war merely prohibits the court from sentencing to imprisonment in the penitentiary in cases where, if the trial had been for the same act in the civil courts, that could not be done, but does not prohibit a court-martial from punishing "conduct to the prejudice of good order and military discipline" by confinement in the penitentiary, nor from superadding the punishment of forfeiture of pay and dishonorable discharge.

PETITION for writs of habeas corpus and certiorari.

James M. Lyddy, for petitioner.

Asa Bird Gardner, for respondent.

WAITE, C. J.—This is a petition for a writ of habeas corpus to release Mason, the petitioner, from confinement in the Albany penitentiary under a sentence by a general court-martial. The facts are these:

Mason was a sergeant in battery B of the second regiment of artillery in the army of the United States. He was tried by a general court-martial on the charge of violating the sixty-second article of war, in that, "having been ordered with his battery from Washington barracks for guard duty at the United States jail in the city of Washington, D. C., and having arrived at said jail for said duty," he "did thereupon, with intent to kill Charles J. Guiteau, a prisoner then confined under the authority of the United States in said jail, willfully and maliciously discharge his musket, loaded with ball cartridge, at said Guiteau, through a window of said jail into a cell then occupied by said Guiteau." Upon a trial duly had he was found guilty of the charge according to the specification, and sentenced "to be dishonorably discharged from the service of the United States with the loss of all pay and allowances * * * due and to become due to him, and then to be confined at hard labor in such penitentiary as the proper authorities may direct for eight years." The Albany penitentiary was designated in due form as the place of confinement under this sentence.

Opinion of the court.

A question which presents itself at the outset is whether this court has jurisdiction to issue such a writ as is asked, inasmuch as it has no power to review the judgments of courts-martial. Upon this question there is not entire unanimity of opinion among the members of the court, and we purposely withhold any decision at this time in respect to it. We all agree, however, that if a writ might issue there could be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence one which the court could, under the law, pronounce.

The sixty-second article of war, under which Mason was tried, is as follows:

"All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or a field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of the court."

The offense charged in this case was clearly one to the prejudice of good order and military discipline.

The offender was a soldier in the army of the United States. As such, according to the specifications of the charge made against him, he was ordered on guard duty at the United States jail in Washington, and, while on duty, he willfully and maliciously discharged his musket with intent to kill a prisoner confined in the jail under the authority of the United States. The gravamen of the military offense is that, while standing guard as a soldier over a jail in which a prisoner was confined, the accused willfully and maliciously attempted to kill the prisoner. Shooting with intent to kill is a civil crime, but shooting by a soldier of the army standing guard over a prison, with intent to kill a prisoner confined therein, is not only a crime against society, but an atrocious breach of military discipline. While the prisoner who was shot at was not himself connected with the military service, the soldier who fired the

shot was on military duty at the time, and the shooting was in direct violation of the orders under which he was acting. It follows that the crime charged and for which the trial was had was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard.

In our opinion the fifty-eighth and fifty-ninth articles of war have no application to the case. The fifty-eighth is as follows:

"In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with the intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or district in which such offense may have been committed."

The object and purpose of this article were elaborately considered in Coleman *v.* Tennessee, 97 U. S., 509. As it is to operate only in time of war, it neither adds to nor takes from the powers which courts-martial have under the sixty-second article in time of peace.

Article 59 is as follows:

"When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs, are required, except in time of war, upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, ex-

cept in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."

It is not pretended that any application was ever made under this article for the surrender of Mason to the civil authorities for trial. So far as appears, the person injured by the offense committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial, he can be again tried in the civil courts is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction."

It is objected that the sentence is in excess of what the law allows. The ninety-seventh article of war is as follows:

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States or by some statute of the State, Territory, or district in which such offense may be committed, or by the common law as the same exists in such State, Territory, or district, subject such convict to such imprisonment."

Under this article, when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear a court-martial is authorized to inflict that

kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged. The sixty-second article provides that the offender, when convicted, shall be punished at the discretion of the court, and the ninety-seventh article does no more than prohibit the court from sentencing to imprisonment in a penitentiary in cases where, if the trial had been for the same act in the civil courts, that could not be done.

It is also claimed that the sentence is in excess of the jurisdiction of the court, because in addition to imprisonment in the penitentiary for the full term allowed by the laws of the District of Columbia for the offense of an assault with intent to kill, it subjects the offender to a dishonorable discharge from the army and a forfeiture of his pay and allowances. As has already been said, under the sixty-second article the punishment is to be at the discretion of the court. The ninety-seventh article only limits this discretion as to imprisonment in the penitentiary, and it has been nowhere provided that the punishment may not in other respects be greater than the civil courts could inflict.

"Cases arising in the land or naval forces" are expressly excepted from the operation of the fifth amendment of the Constitution, which provides that "no person shall be held to answer a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The limitation as to "actual service in time of war or public danger" relates only to the militia. (Dynes *v.* Hoover, 20 How., 65.)

It follows that the rule must be discharged; and it is so ordered.

DENIED.

Syllabus.

THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA v. CHARLES P. GREENOUGH, ADMINISTRATOR OF FRANCIS VOSE, DECEASED.

May 8, 1882.

1. Whilst in ordinary cases an appeal does not lie from a decree in equity for costs only, yet it does lie when the costs are directed to be paid not by a particular party, but out of a fund in the hands or under the control of the court.
2. A decree made by a Circuit Court of the United States directing the payment of costs and expenses out of a fund in court to the complainant—the fund, in the meantime, remaining in the court in course of administration—is *pro tanto* a final decree from which an appeal will lie to this court.
3. It is a general principle that a trust estate must bear the necessary expenses of its administration.
4. One jointly interested with others in a common fund, and who, in good faith, maintains the necessary litigation to save it from waste and destruction and secure its proper application, is entitled in equity to reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportional contribution from those who receive the benefit of the litigation.
5. Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who, in good faith, files a bill to secure the due application of the fund, and succeeds in bringing it under the control of the court for the common benefit of the bondholders, is entitled to have his costs, counsel fees and necessary expenses of the litigation—that is to say, his costs as between solicitor and client—paid out of the fund before its distribution.
6. Such a complainant, however, is not entitled to an allowance for his private expenses, such as traveling fares and hotel bills, nor for his own time or personal services.
7. The practice of allowing large and extravagant counsel fees and commissions to trustees, complainants, and receivers, and their counsel, to be paid out of trust funds under the control of the court, commented on and disapproved.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

C. W. Jones, for appellants.

C. D. Willard and *Jeff Chandler*, for appellee.

Opinion of the court.

BRADLEY, J.—The question in this case is one of costs, expenses, and allowances awarded to the complainant below out of a trust fund under the control of the court. Ordinarily a decree will not be reviewed by this court on a question of costs merely in a suit in equity, although the court has entire control of the matter of costs, as well as the merits, when it has possession of the cause on appeal from the final decree. But it was held by Lord Cottenham, in the case of Angell *v.* Davis, 4 Myl. & Craig, 360, that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund. Lord Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs; as, where the costs are part of the specific relief prayed, and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of its merits. But these suggestions have not met with subsequent approval; and in the case of Taylor *v.* Dowlan, L. R., 4 Chancery Appeals, 697, the court declared that they were not disposed to extend the case of Angell *v.* Davis, and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund.

But these discussions in the English courts arose under a system in which appeals from interlocutory orders are allowed. We can only entertain an appeal from a final decree; and supposing the objection to the appeal on the ground of its being from a decree for costs only is untenable, as we think it is, then arises another question, whether the orders appealed from amount to a final decree.

The principal suit was commenced in 1870 by a bill filed by Francis Vose, a large holder of bonds of the Florida Railroad Company, on behalf of himself and the bondholders, against Harrison Reed and others, trustees of the internal improvement fund of Florida, and against the former members

of the same board, and against the board itself as a corporation, and sundry other corporations alleged to be in complicity with them. The internal improvement fund consisted of ten or eleven millions of acres of land belonging to the State, including certain proceeds of sales of some of said lands, and was pledged for the payment of the interest accruing on said bonds and instalments of a sinking fund, for meeting the principal, which were largely in arrear. The charge of the bill was to the effect that the trustees were wasting and destroying the fund by making sales at nominal prices by the hundred thousand and even million of acres, and failed and refused to provide for the payment of interest or sinking fund on the bonds; and the bill prayed that the fraudulent conveyances might be set aside, that the trustees might be enjoined from selling more lands, and that a receiver might be appointed to take care of the fund.

The litigation was carried on with great vigor and at much expense, and in fact a large amount of the trust fund was secured and saved; the management of the fund was taken out of the hands of the trustees; agents were appointed by the court to make sales of the land, and made a large number of sales; a considerable amount of money was realized, and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful. In 1875 he filed a petition setting forth these advances and the efforts made by him, and prayed an allowance out of the fund for his expenses and services. In December, 1876, an order was made by the court referring it to a master to ascertain: 1 What and by whom the necessary expenditures have been incurred in bringing the moneys already received into court. 2. What necessary expenditures have been made, and by whom, in protecting the landed and sinking fund from which this money has been and will be realized. 3. What personal services have

been rendered, and by whom, in said work, and the value thereof. 4. What amount of same have been charged to Francis Vose by the receiver, instead of being paid out of the common fund in his hands.

Vose presented his account and vouchers before the master, and testimony was taken on the subject. In 1877 the master made a report, in which, amongst other things, he stated as follows:

"First. After consideration of the proofs as submitted to me, I find and report that the moneys which have already been received, whether upon account of the internal improvement fund or of the sinking fund, have been brought into court at the instance and the suit and by the sole efforts of Francis Vose, the petitioner, through himself, his solicitors and his agents, and by the instrumentality more directly and especially of his proceeding in equity against the trustees of the internal improvement fund *et als.*, as they appear in the records which are made evidence in this case."

The master further reported a statement of expenditures made by Vose in the cause, and declared that they were necessary expenditures, being for fees of solicitors and counsel, costs of court, and sundry small incidental items for copying records and the like, the whole amounting to $34,192.62. He also stated and allowed sundry fees paid in maintaining other suits in New York, and on appeal to this court, attorneys' fees for resisting fraudulent coupons, and expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands, amounting in all to $19,745.68. He also reported in favor of an allowance to Vose for his personal services and expenditures, as follows:

"I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and the sinking funds; those services extending over a period of more than eleven years. By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies

he employed and sustained, and by his own vigilance and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land, and has brought into this court large sums of money, which, from time to time, have been distributed by its orders.

"I consider and report that the charge embraced in his itemized account, and numbered forty-two (42), for $25,000 principal and $9,625 interest, is reasonable and just.

"I also find that the charge in his itemized account numbered forty-one (41), for personal expenditures of $15,003.35, is reasonable and just. Total, $40,003.35."

The first of these items consisted of an allowance of $2,500 a year for ten years of personal services; the second was for railroad fares and hotel bills paid by the complainant.

The proceedings before the master were opposed, but on a hearing upon the report and the evidence submitted therewith, the court confirmed it to the extent of $27,835.34, allowing generally the fees of the officers of the court and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client; at the same time disallowing certain fees paid to advisory counsel and other items not directly connected with the suit, and referring the remainder of the report for further evidence and hearing. In December, 1879, after additional evidence had been taken, a final order was made allowing sundry expenses for looking after and reclaiming the trust lands, and also allowing for the personal expenses and services of Vose embraced in the two items before referred to; the total amount allowed being $60,131.36.

The appeal to this court is taken from these orders of the court below, and it is contended that they were illegal, because Vose was not before the court in the character of a trustee, and therefore not entitled to reimbursement of his expenses beyond taxable costs, and because the allowances were not lawful if he had been such trustee. The objections to the

orders are not expressed in this precise form, but this is the substance of them.

The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purpose of an appeal.

As to the point made by the appellants, that the complainant is only a creditor seeking satisfaction of his debt, and cannot be regarded in the light of a trustee, and therefore is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund, and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust, and where all this has been done, and done at great expense and trouble on the part of the complainant, and the other bondholders have come in and participated in the benefits resulting from his proceedings,—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust*,

and to have secured the proper application to their use. There is no doubt from the evidence that, besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution. And such charge cannot be justly complained of by the trustees of the internal improvement fund, because however fair may have been the conduct of the present trustees, who were elected to their positions since the acts complained of were committed by their predecessors, those acts, as the event of the cause shows, furnished abundant ground for instituting the proceedings.

It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. Thus, in Attorney-General *v.* The Brewers' Company, 1 P. Wms., 376, Lord Chancellor Cowper allowed costs to the relators out of the improved rents which they received for the charity, "for that they had been serviceable to the charity, by easing them of the six hundred and twenty pounds

debt which was claimed against them." In Attorney-General *v.* Kerr, 4 Beavan, 297, it is conceded to be the general rule that the relator in a charity information, upon obtaining a decree, is entitled to his costs as between solicitor and client. In that case they were not allowed out of the general charity estate, but were charged upon the particular property recovered.

The same rule was followed in Attorney-General *v.* Old South Society, 13 Allen, 474.

Of course it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee bill. This difference is pointed out in the case *in re.* Paschal, 10 Wall., 483, 493.

The same rule is applied to creditors' suits where a fund has been realized by the diligence of the plaintiff. In England, where specialty creditors have a preference, a simple contract creditor who recovers a fund for the general benefit is allowed his costs, as between party and party, out of the fund in preference to all other claims; and the balance of his costs, as between solicitor and client, are to be paid either out of the fund, or *pro rata* by all the creditors who partake of the benefit of the suit. This was the judgment in Stanton *v.* Hatfield, 1 Keen, 358; followed in Thompson *v.* Cooper, 2 Collyer, 87. In the latter case Vice-Chancellor Knight Bruce said: "Having come in and proved and obtained the benefit of the suit which was instituted on their behalf, as well as that of the plaintiff, it cannot be just that in such a suit—a suit instituted for the benefit of all the creditors—one alone should bear the burden, when others have the benefit." To the same purport see Tootal *v.* Spicer, 4 Simons, 510; Larkin *v.* Paxton, 2 Myl. & K., 320; Barber *v.* Wardle, Id., 818; and Sutton *v.* Doggett, 3 Beav., 9.

The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses

paid out of the fund, prevails in bankruptcy cases. In Worrall *v.* Hartford, 8 Ves., 4, Lord Eldon said: "The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied if not expressed." This rule has been followed by the District Courts of the United States. (See a forcible opinion of Judge Bryan, *in re.* Williams, 2 Bank. Reg., 28, in the District Court of South Carolina; and the case of O'Hara, 8 Law Register, N. S., 113, in the western district of Pennsylvania.) In a case in Massachusetts before Judge Lowell the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of Judge Lowell are so apposite, and seem to us so well considered, that we quote from his opinion. "A petition *in invitum*," says he, "to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may prove their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and in most cases, though not in this, no single creditor, nor any three or four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts. * * * The strong equities of the petitioner's case are not difficult to discover; and the practice under the act of 1841 was to allow such a charge out of the assets, as I find by examining the records.

My doubt was of my power in the premises under the fee bill of 26th of February, 1853, (10 Stat., 161,) which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims. * * * I have been referred to the record of a case in equity in the Circuit Court in which Judge Sprague, since the passage of the fee bill, ordered the counsel fees of all parties to be paid out of the fund; and Judge Kane adopted a like rule in *ex parte* Plitt, 2 Wall. Jr., 453. These decisions, and those in bankruptcy already cited, justify me in construing the statute in the way which the equities of the case so clearly demand."

The views here expressed with regard to the application of the fee bill to cases of this sort are undoubtedly correct. The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients —other than the government—such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. (Act of 1853, sec. 1, 10 Stat., 161; Rev. Stats., sec. 823.) And the act contains nothing which can be fairly construed to deprive the court of

chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

This court, in the case of Cowdrey *et al. v.* Galveston R. R. Co., 93 U. S., 352, sustained an allowance of $5,000 for counsel fees, to be paid to counsel out of the proceeds of a railroad mortgage foreclosed in the Circuit Court for the District of Texas, being the amount agreed by the trustees to be paid for instituting proceedings which were discontinued by the intervention of the civil war. A new bill was afterwards filed by some of the bondholders, and the fund was brought into court, and the fee in question was directed to be paid by the receiver. We regarded the charge as a proper one to be paid out of the fund. Liberal allowances were also made by the Circuit Court in the same case for counsel fees and other charges incurred by the complainants in the cause, which were never brought to this court for review.

In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel as have sometimes been made, and which have justly excited severe criticism.

Still, a just respect for the eminent judges under whose direction many of these cases have been administered would lead to the conclusion that allowances of this kind, if made

with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice.

The subject of allowances to be made to trustees *eo nomine* is very fully examined in the books. An exhaustive citation of both English and American authorities is to be found in the notes to the case of Robinson *v.* Pett, 2 White & Tudor's Leading Cases in Equity, 238, American edition, pp. 512–600; and see Perry on Trusts, sections 894, 910, 912.

It is unnecessary, however, to pursue the subject further. The conclusion to which we have come is that, under the circumstances of this case, the Circuit Court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case by the appellants that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made.

But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. In England and some of the States no such allowance is made even to trustees *eo nomine*. In other States it is. But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors for his and their own benefit and advantage. The reasons which apply to his expenditures incurred in carrying on the suit and reclaiming the property subject to the trust do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where

an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.

We are of opinion, therefore, that the allowance for these purposes was illegally made, and that to this extent the orders should be reversed. We refer to the allowance in the last order of $15,003.35 for private expenses and of $34,625 for personal services. As to those items the said last order will be reversed, and in all other respects both of the orders appealed from will be affirmed.

MILLER, J. (dissenting.)—While I agree to the decree of the court in this case, I do not agree to the opinion so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely, the absorption of a property or a fund which comes into the control of a court by making allowances for attorney's fees and other expenses, pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney, or incurred the costs, never had any interest in the property or fund in litigation.

This system of paying out of a man's property some one else engaged in the effort to wrest that property from him, can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than make my protest against the doctrine.

AFFIRMED.

THE STEAMBOAT POTOMAC, JAMES A. BATCHELOR, AND OTHERS, CLAIMANTS, v. JOHN W. CANNON.

May 8, 1882.

1. Upon a libel in admiralty for a collision, the libelant may be allowed damages for the loss of the use of his vessel while laid up to repair the injuries thereby suffered; and if at the time of the collision she was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be otherwise satisfactorily ascertained, the average of the net profits of her trips for the season may be adopted as the measure of the allowance.
2. A vessel being insured on two-thirds of her valuation by valued policies, by which, in case the insurers should pay any loss, the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for account of the insurers, if requested, and that they should be entitled to such proportion of the damages recovered as the amount insured bore to the valuation in the policies, the assured filed a libel in admiralty against another vessel for damages suffered by a collision. The insurers paid the libelant two-thirds of that damage, and released and assigned to the owners of the libelled vessel all their right in any damages growing out of the collision. It appearing that the collision was owing to the fault of both vessels, the libelant could recover only half of the damages sued for: *Held*, That one-third of the sum paid by the insurers must be deducted from the amount to be recovered.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

T. D. Lincoln, for appellants.

W. W. Howe, *J. H. Kennard*, and *Bentinck Egan*, for appellee.

GRAY, J.—This is a libel in admiralty for collision, filed by the owner of the steamboat Robert E. Lee against the steamboat Potomac. In the District Court, and in the Circuit Court on appeal, both vessels were found to have been in fault, and, therefore, according to the settled rule in admiralty, affirmed and established by this court in The Catharine, 17 How., 170, the amount of the damages to each vessel, being $19,411.27 to the Robert E. Lee and $7,330.52 to the Potomac, was equally

divided between the two. The Circuit Court having found and stated the facts, and stated its conclusions of law, its finding of the facts is conclusive, and the questions of law so stated upon the record are open for revision in this court upon appeal, without any bill of exceptions. (Stat. February 16, 1875, 18 Stat., 315; The Francis Wright, *ante*, p. 487; The S. C. Tryon, *ante*, p. 360.)

Both the questions of law presented by the record relate to the amount of the damages that the libelant is entitled to recover.

One question is as to the sum to be allowed for the detention of his vessel while repairing the injuries suffered by the collision. The rules of law governing this question are well settled, and the only difficulty is in applying them to the peculiar facts of the case.

In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it. In no event can more than the net profits be recovered by way of damages; and the burden is upon the libelant to prove the extent of the damages actually sustained by him. (Williamson *v.* Barrett, 13 How., 101; Sturgis *v.* Clough, 1 Wall., 269; The Cayuga, 2 Benedict, 125; 7 Blatchf. C. C., 385; 14 Wall., 270; The Gazelle, 2 W. Rob., 279; S. C., 3 Notes of Cases, 75; The Clarence, 3 W. Rob., 283; S. C., 7 Notes of Cases, 579.)

The report of the commissioner, which was approved in this respect by both courts below, states that the Robert E. Lee was engaged in a certain, permanent, and lucrative trade, making weekly trips on the Mississippi River between New Orleans and Vicksburg and intermediate ports, and states one item of the

damage to her thus: "Demurrage allowed for loss of three trips in her established trade, being the profits which, according to the average of her whole business for the season, she would have realized on said trips, $7,173.48." The reason given by the Circuit Court for allowing such profits, instead of the charter value of the vessel during the time of her detention, was that "being engaged in a regular established line, and being peculiarly fitted for that line, her charter value could not be satisfactorily ascertained; and other vessels which could be procured to supply her place were not equally fitted for the service." The commissioner's report and the deposition of the clerk of the boat, which was made part of that report, show that the amount allowed was ascertained by taking the average of the profits of the trips performed by her within six and a half months next before the collision, deducting only the expenses as ascertained at the end of each trip, and deducting nothing for insurance, or for wear and tear, or for necessary repairs at the end of the season. But as the clerk testified that she was in no need of repair at the time of the collision, and there was neither suggestion nor evidence before the commissioner that the premiums of insurance were lessened while she was laid up for repairs, a majority of the court is of opinion that it cannot be said, as matter of law, that the sum allowed for her detention was excessive.

The only other question argued at the bar is whether certain sums paid to the libelant by underwriters on his vessel should be deducted from the damages which he is entitled to recover in this suit. The determination of this question depends upon the effect of the following facts:

At the time of the collision the Robert E. Lee was insured in various sums, amounting to $50,000 in all, against perils of the sea, river, and fire, by concurrent policies in different insurance companies, each of which valued her at $75,000, and contained this provision: "Whenever this company shall pay any loss, the assured agrees to assign over to said company all right to recover satisfaction therefor from any other person or

persons, town or other corporation, or the United States Government, or to prosecute therefor at the charge and for account of the company, if requested. And the said company shall be entitled to such proportion of said damages recovered as the amount insured by them bears to the valuation of said vessel."

The insurance companies paid to the libelant in the aggregate, for the loss sustained by his vessel by the collision, the sum of $7,429.52, which was arrived at by assuming the damage to her at $14,347.34, including about $2,000 for wages and expenses during her detention, instead of profits lost, then deducting one-third of the repairs, new for old, amounting to $3,203.06, and charging the assured with one-third of the balance, as his portion of the risk assumed, not covered by the insurance.

After the filing of this libel in the District Court, the insurance companies executed and delivered to the claimants an instrument in writing, by which, after reciting the collision, the payment of the insurance money, and that they had never authorized the bringing or prosecution of this suit, and desired no suit brought on their account, they released, discharged, and set over to the owners and master of the Potomac "any and all right which they have in and to any damage, or claim of damage, if any there be, whether legal or equitable, growing out of the said collision, and authorize them to use the same, by way of defense or otherwise, in and to the said suit." There was no evidence that the insurance companies had ever authorized this suit to be brought, or that the claimants had paid any consideration for the release and assignment.

The claimants, under apt allegations in their answer and cross-libel, contended that the amount so paid by the insurance companies should be deducted from the libelant's damages before bringing them into account with him. The District Court so held, and deducted the whole of that amount from the moiety of the damages to the Robert E. Lee which the libelant was entitled to recover against the Potomac. The Circuit Court, on the other hand, held that no part of that

amount should be deducted. This court is of opinion that neither of these decisions was correct.

The mere payment of a loss by the insurer does not indeed afford any defense, in whole or in part, to a person whose fault has been the cause of the loss, in a suit brought against the latter by the assured. But, upon familiar principles, often recognized by this court, the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrong-doer, or other party responsible for the loss, and may enforce this right by action at common law in the name of the assured, or, when the case admits of proceeding in equity or admiralty, by suit in his own name. (Hall *v.* Railroad Co., 13 Wall., 367; Comegys *v.* Vasse, 1 Pet., 193; Fretz *v.* Bull, 12 How., 466; The Monticello, 17 How., 152; Garrison *v.* Memphis Ins. Co., 19 How., 312. See also The Sarah Ann, 2 Sumner, 206; The Ann C. Pratt, 1 Curtis, 340; Clark *v.* Wilson, 103 Mass., 219; Yates *v.* Whyte, 5 Scott, 640; S. C., 4 Bing., N. C., 272; 1 Arnold, 85; Simpson *v.* Thompson, 3 App. Cas., 279.)

This right of the insurer is not contingent upon the loss having been total, or upon its having been followed by an abandonment, but rests upon the ground that his contract is in the nature of a contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to his right of action against them. (Phil. Ins., sec. 1723; Hall *v.* Railroad Co., 13 Wall., 371; White *v.* Dobinson, 14 Sim., 273; Quebec Assurance Co. *v.* St. Louis, 7 Moore P. C., 286; Dickenson *v.* Jardine, L. R., 3 C. P., 639, 644; Simpson *v.* Thomson, 3 App. Cas., 284, 293; Darrell *v.* Tibbitts, 5 Q. B. D., 560.)

By the express terms of each of the policies upon the Robert E. Lee, the insurers, upon payment of a loss, were entitled to demand from the assured an assignment of his right to recover damages against the Potomac for the loss so paid for, or to bring suit for such damages in his name, and to hold to their

own use such proportion of those damages as the amount insured bore to the valuation of the Robert E. Lee in the policy; and that valuation is conclusive in respect of all rights and obligations arising from the policy of insurance. (North of England Insurance Association *v.* Armstrong, L. R., 5 Q. B., 244.)

The amount which, by the effect of the contract of insurance and of the payment of a loss under it, the insurers had the right to recover to their own use from the Potomac and her owners, they had the right to release and assign, if they saw fit, to those owners. The claim of the latter to a deduction on this account from the damages to be recovered against them does not arise out of any right of their own, but out of the right so derived from the insurers. The Circuit Court therefore erred in holding that no part of this amount should be deducted from the libelant's damages.

But the insurers are entitled only to damages to be recovered for an injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation in the policies. As the amount insured was only two-thirds of the valuation, leaving the owner to stand his own insurer for the remaining third, and as the damages to be recovered in this suit are for the injury to his whole interest, whether insured or uninsured, it is quite clear that the insurers had no right to more than two-thirds of the damages so recovered.

Besides, the insurance applied to all injuries caused to the insured vessel by collision, whether the collision was owing to unavoidable accident, or to negligence on the part of the other vessel, or to negligence of the master and crew of the vessel insured. (Phil. Ins., sections 1049, 1099; General Mutual Ins. Co. *v.* Sherwood, 14 How., 351.) The insurers, therefore, within the limit of their policies, were responsible to the assured for the entire damage to his vessel, and not merely for the moiety thereof which, because of the fault on her part as well as on the part of the other vessel, was all that he could recover

against the latter; and the sum paid to him by the insurers is equally applicable to that portion of the damage for which he cannot recover against the other vessel and her owners, as to that portion for which he can so recover.

The necessary consequence is that only one-half of two-thirds, or one-third of the sum paid to the libelant by the insurers, can be treated as paid on account of the damages which he can recover in this suit, and, therefore, under the claim made in the answer and at the argument, that third only can be deducted from those damages.

The result is that the decree of the Circuit Court awarding to the libelant the sum of $6,040.37, being one-half of the excess of the damages sustained by the Robert E. Lee over the damages sustained by the Potomac, must be reversed in so far as to deduct from that sum the sum of $2,476.51, being one-third of the sum paid to him by the insurance companies, and must in other respects be affirmed; and it is so ordered.

PARTLY REVERSED.

THE WEBSTER LOOM COMPANY v. ELIAS S. HIGGINS AND NATHANIEL D. HIGGINS.

May 8, 1882.

1. A specification in letters-patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which the invention belongs.
2. Evidence is admissible to show the meaning of terms used in a patent, as well as the state of the art, for the purpose of enabling the court, or jury, to understand it.
3. If an improvement of a well-known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine; the patent is to be read as if the machine and its appendage were present, or in the mind of the reader, and he a person skilled in the art.
4. *Query:* Whether the defense of insufficient description can be set up without alleging an intent to deceive the public?
5. A new combination of known devices, producing a new and useful re-

sult, (as that of greatly increasing the effectiveness of a machine,) is evidence of invention, and may be the subject of a patent.

6. Webster's improvement in looms for weaving pile fabrics, which consisted in such a new combination of known devices as to give to a loom the capacity of weaving fifty yards of carpet a day, when before it could only weave forty, *held* to be patentable, and his patent for the same, dated August 27, 1872, sustained.
7. Of two original inventors, the first will be entitled to a patent unless the other puts the invention into public use more than two years before the application for a patent.
8. An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it.
9. Though the defense of prior invention ought to be set out in the answer, yet if the omission to set it out is not objected to at the proper time in the court below, it cannot be objected to in this court.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

E. N. Dickerson, for appellant.

George Gifford and *W. M. Evarts*, for appellees.

BRADLEY, J.—The bill in this case was filed by the appellants to obtain relief for an alleged infringement by the defendants of certain letters-patent for improvements in looms for weaving pile fabrics, &c., granted to one William Webster on the 27th of August, 1872, and numbered 130,961, to which the plaintiff deraigns title. The defenses set up in the title are, first, a denial of infringement; second, a denial that Webster was the first inventor of what was patented to him, under which denial various prior letters-patent are specified as containing the invention or material parts thereof, including a patent granted to Erastus B. Bigelow in March, 1849, reissued in 1857, a patent granted to E. S. Higgins as assignee of William Weild in August, 1868, and a patent granted to E. K. Davis in February, 1869; third, that the invention was used by and known to E. K. Davis in the city of New York, and Thomas Crossley in New York and Bridgeport, Connecticut;

fourth, that the description in Webster's patent is obscure, and not sufficient to enable one acquainted with the art to which it belongs to construct or use the loom therein attempted to be described; fifth, that there is no description in the patent of the combination principally claimed and relied on. The answer also sets up an agreement between Webster and the defendants whereby they claim a right to use the alleged invention of Webster. Proofs being taken and the cause heard, the bill was dismissed by the Circuit Court, and the decree of dismissal is now here on appeal.

The patent, as before stated, is for improvements in looms for weaving pile fabrics, &c., and the nature and object of the invention are set forth in the specification as follows:

"The first part of my invention relates to the combination and arrangement of the reciprocating or driving slide, sliding-bar, withdrawing and inserting devices, and trough, in such a manner that the trough shall be capable of oscillating between the points of withdrawal and insertion of the wire, the sliding-bar receiving a horizontal motion at the same time that the pushing-slide is being reciprocated on the trough by the driving-slide. The advantage of this part of my invention is that a shuttle-box, rigidly connected with the lay, may be used. The second part of my invention relates to the means for preventing the wire from bounding back from its position in the wire-box, and consists in a spring attached to the inner end of the wire-box, and fitting indentations or openings in the heads of the wires. The third part of my invention relates to the combination of the vibrating trough directly with the lay. The fourth part of my invention relates to a modification of the mechanism, and consists in having the oscillating trough and reciprocating-slide pathway combined or made in one piece, and having the withdrawing and pushing devices combined or connected and reciprocated thereon by power applied directly thereto; the object of this part of my invention being to dispense with the driving-slide and stationary-slide pathway and sliding-bar. The fifth part of my invention consists in

the combination, with a lay having a rigid shuttle-box, of a pivoted vibrating wire-trough, a reciprocating driving-slide, and latch, the latter being operated by the wire-box to release the wire, and the slide and latch moving on the trough, all as set forth."

The specification then proceeds to describe the mechanism of the invention by a description and reference to drawings, which exhibit a front view of the improvement, a top view, a wire-head, a sectional part and end view of the wire-box, the oscillating trough connected to the shuttle-box or lay of a loom, the same connected to the breast-beam of a loom, &c., all which would be incomprehensible to a person unacquainted with looms for weaving pile fabrics, but very plain to one who understood their construction and operation at the date of the patent. A person skilled in the art of constructing or using such looms in their most advanced and improved form, such as those known as the Bigelow loom and the Weild loom, and having one actually before him, or in his mind, would readily appreciate the meaning of the terms and the character of the improvement described.

In weaving piled fabrics—such, for example, as Brussels carpet—the pile or loop is formed by inserting a wire alternately with the filling between the threads of the warp, immediately under the woollen or worsted threads, and afterwards withdrawing it from the web of cloth. At first these wires were inserted and withdrawn by hand, by the aid of an assistant, which made the process a very slow one, so that only a few yards could be woven in a day on a single loom. The first great improvement was introduced about 1840–50 by Erastus B. Bigelow, of Massachusetts, who invented a mechanical apparatus attached to the side of the loom which automatically inserted the wires in the shed or opening between the warps, and withdrew them from the web. About a dozen wires were used, and after they had all been inserted, the device invented by Bigelow would vibrate forward and seize the head of the first wire, withdraw it from the web, and then vibrate back to the

shed, and at the proper moment insert it; and so it would go on to operate as long as the loom was kept in motion. Its various motions were given and timed by means of cams of proper size and shape placed in connection with the principal movements of the loom itself. This attachment to pile fabric looms became generally known as the wire movement, and by its aid twenty-five yards a day could be woven on a single loom without the aid of any assistant. It is seldom that such a complete revolution in one of the useful arts is made at a single jump. Improvements, however, have been made on Bigelow's invention. Among others, one William Weild, of Manchester, England, in or about the year 1855 effected a decided improvement, which, after being perfected by succeeding improvements, enabled him to weave thirty or forty yards a day on a single loom. The means by which this was accomplished was the placing of a horizontal trough, or grooved bar, called a wire-trough, or wire-bar, for the wire to rest on when drawn out of the web and thrust into the shed. In Bigelow's loom the wire simply rested on a fork placed close to the loom; and when it was fully drawn out by the clamp, or dog's-head, which seized it for that purpose, being slender and flexible, it would sag in the middle, and if driven rapidly into the shed the forward end would spring upward and get entangled in the upper warp threads. This rendered a slow movement necessary, which impeded the rapidity of the work. By giving it a trough, or grooved bar, to lie in and keeping it straight, as was done by Weild, a quicker motion could be given to it, and a much larger amount of work could be done in the same time. The only difficulty in the way of operating with the trough as arranged by Weild was that a certain part of the apparatus, called a pusher, which was a cross-bar or yoke extending across and connecting the breast-beam and the wire-bar, and which was employed to push the wire into the shed, extended so far back towards the lathe, or lay, which carries the reed and shuttle-box, as to come in contact with it and interfere with its motion. Weild obviated this difficulty by sawing off, so to

speak, the outer end of the lay containing the shuttle-box, which being thus detached from the rest of the lay could be separately kept back whilst the reed was driving up the filling, and was thus prevented from striking the wire-trough and pusher. But of course this detached portion of the lay required additional cam work and complicated the machinery. There was also another matter that interferred with the perfect efficiency of Weild's loom. The pusher, after the wire was drawn out by a hook attached, did not seize the head of the wire, but simply pushed it forward into the shed. If this was done with too rapid a motion, the impetus given to the wire would throw it forward too far in case the loom had to be suddenly stopped on account of a broken thread or other cause. This made it necessary to work the loom more slowly than the other operations required.

This seems to have been about the state of the art when Webster began to devote his attention to the improvements which he claims to have invented, and which it is clearly shown, whether invented by him or some one else, resulted in giving to a loom the capacity of weaving fifty yards a day. The Bigelow looms were well known and in extensive use. The Weild looms were also well known. Some improvements not necessary to notice had also been made on both. Webster's first conception of his invention occurred and his original drawing was made in the winter of 1865–66; but he did not apply for his patent until June 21, 1870, and it was not issued until August 27, 1872. Prior to that time the defendants, who had a large establishment in the city of New York and were using Bigelow's loom under a license, had procured the control of Weild's patents in this country, and had applied Weild's improvements, with some modifications made by E. K. Davis, to a large number of their Bigelow looms. Davis was their head machinist, and in 1868 he obtained a patent for an improvement on Weild's loom, by which, instead of detaching the whole outer end of the lay, he only detached the shuttle-box and caused it to slide back on the lay so as to make room for

the wire-trough. He also adopted instead of the wire-trough a pair of parallel bars between which to move the wire, the latter resting on a pin between the bars, near to the loom. The loom itself was old. Every part of it was familiar to every loom manufacturer and to every weaver. Its lathe, its treddles, its breast-beam, its shuttle-boxes and shuttle-slide were as well known to all those concerned in the weaving of pile fabrics as the plough or the cultivator is to the farmer. The wire motion had also become well known. Its mode of attachment to the loom; the means of giving motion to its different parts; the parts themselves; the vibrating wire-support, whether a fork or a trough, and whether pivoted to the breast-beam or to a post, or to the frame or floor; the reciprocating driving-slide; the dog's-head for holding and the pusher for driving the wires; the wire-box that kept the wires in place; the rigid lathe, the lathe whose outer end was detached, and the lathe with a detached shuttle-box,—all these things were as well known as the alphabet to all those skilled in the art of pile weaving as it then stood. With this mass of previous knowledge and nomenclature in their minds, (as we must suppose it to have been,) the language, the explanations, the drawings, and the claims of Webster's patent must have been perfectly intelligible to them. When an astronomer reports that a comet is to be seen with the telescope in the constellation of Auriga, in so many degrees of declination and so many hours and minutes of right ascension, it is all Greek to the unskilled in science; but other astronomers will instantly direct their telescopes to the very point in the heavens where the stranger has made his entrance into our system. They understand the language of their brother scientist. If a mechanical engineer invents an improvement on any of the appendages of a steam engine, such as the valve-gear, the condenser, the steam-chest, the walking-beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal ma-

chine. These are already familiar to others skilled in that kind of machinery. He may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings.

Applying these remarks to the specification before us, and recurring to the extract already made setting forth the nature and object of the invention, it is easy to conceive that its meaning may be plain to those for whose use it is intended. They know at once what is meant by the terms "reciprocating or driving slide," "sliding-bar," "withdrawing and inserting devices," "trough," "wire," "wire-box," "lay," &c., &c. They also understand the movements referred to and the objects to be attained by each device.

In like manner, if we follow the specification in its description of the invention in detail, with the references to the drawings and the closing summary of the patentee's claims, the same method of interpretation will be applicable. And as it cannot be expected that the court will possess the requisite knowledge for this purpose, it becomes necessary that it should avail itself of the light furnished by the evidence to enable it to understand the terms used in the patent and the devices and operations described or alluded to therein. This evidence, of which the record in this case furnishes an abundance, being resorted to, we have no difficulty in comprehending the patent, or the nature of the invention therein described.

A great deal of testimony was introduced by the defendants to show that the patentee had failed to describe his invention in such full, clear, and exact terms as to enable persons skilled in the art to construct and use it. It seems to us that the attempt has failed. When the question is whether a thing can be done or not, it is always easy to find persons ready to show how not to do it. But it stands confessed that the thing has been done, that is to say, the contrivance which Webster claims in his patent has been applied, and very successfully so, to pile

fabric looms, and, as the appellants' counsel well remarks, no one except Webster has ever appeared to claim a patent for doing it. If the thing could not be understood without the exercise of inventive power, it is a little strange that it should have been so easily adapted to the looms on which it has been used and produced such striking results.

It is worthy of remark, in this connection, that the defendants, in their answer, state it as a fact that prior to the alleged invention of Webster looms containing lays, having shuttle-boxes rigidly attached, were publicly known and described in certain English patents, which they specify, and that all the other parts and elements mentioned in the fifth claim of Webster's patent —being the claim relied on—were described in another English patent of one Birkbeck; and they aver and insist, as will be more fully noticed hereafter, that the application and use of the two things together, that is, the parts described in Birkbeck's patent with the rigid lay and shuttle-box described in the other patents, were obvious and required no invention; and that, therefore, the alleged invention of Webster was well known and constituted a part of the known state of the art. This averment in the answer, which of course is sworn to, does not seem to tally very well with the allegation that Webster has failed to point out in his patent how to use and apply his invention, and that it requires further invention to use and apply it.

The appellants, indeed, have raised the question whether evidence to show that the invention is not described in the patent in such full, clear, and exact terms as to enable a person skilled in the art to construct and use it is admissible, unless the defense is specially set up in connection with a charge that the description in the patent was made defective for the purpose of deceiving the public. The twenty-sixth section of the act of 1870, under which the patent in question was issued, declares "that before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the commissioner, and shall file in

the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." Such a specification must be filed before the inventor shall receive a patent, the law says; and the appellants' counsel argues that if it is the duty of the commissioner to see that such a specification as the law requires is filed before granting a patent, not only is the patent, when issued, proof that he has done so, but his decision on the point cannot be questioned except in the manner allowed by the law; else, instead of one tribunal for deciding a matter on which conflicting testimony can always be found, we shall have as many tribunals as there are courts and juries called upon to try patent causes. On turning to the section which provides for certain defenses that may be made to an action for infringement, we find it declared "that in an action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters: First, that for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect." Then follows a statement of other special matters. In view of this specific defense allowed by the statute, in reference a defective specification, it is argued that no other is admissible under that head; and reference is made to some decisions under the former statutes bearing on that subject, namely, Whittemore

v. Cutter, 1 Gallison, 434; Lewis *v.* Lewis, 1 Mason; Gray *v.* James, Peters C. C. Rep., 394; Grant *v.* Raymond, 6 Peters, 218; this court, in the last case, holding, contrary to the decisions of Judges Story and Livingston in the other cases, that it was not necessary to aver a fraudulent intent unless the defendant desired to avoid the patent—a result which was provided for in the law of 1793. The court held that the plea of insufficient description was good as a defense without alleging a fraudulent intent, but not good as a ground for avoiding the patent. The laws of 1836 and 1870 omitted the clause for annulling the patent, but still retained, in the definition of the defense allowed to be set up, the qualification of fraudulent intent. Counsel argues that as the law now stands the plea of insufficient description cannot be made unless made with that qualification, because the only purpose it has, under the present law, is that of a defense to the action, and it still requires the allegation of fraudulent intent to deceive the public.

There is plausibility in this argument, and if it were necessary to the decision of this case it might give us some embarrassment. But as we are satisfied that the terms of the patent are sufficiently clear and full in the description of the invention, we make no decision on the point.

Turning now to the invention claimed by Webster, and described in the patent under consideration, we find that although it produced a great improvement in the art of weaving pile fabrics, yet as actually exhibited in conception and accomplishment it seems simple. The thing to be done was to combine the advantages of Bigelow's rigid lathe, divested of some of its defects, and his constant command of the wire, with Weild's trough, or wire-bar, for supporting the wire. This Webster, or, if not Webster, some other person, effected by the devices and mechanism described in the patent. Stated in brief as therein set forth, aided by the explanatory testimony before referred to, the problem was solved by substituting for Weild's pusher a latch which rides on the wire-bar, or trough, without projecting beyond it, and which receives a reciprocating

motion backward and forward on the bar, either by being connected with a driving-slide moving on the breast-beam, or by being directly connected with an upright reciprocating lever. The latch, when the end of the wire-bar next to the loom oscillates or vibrates to the front of the wire-box, drops upon a wire-head into a nick or notch made therein, and withdraws the wire into the trough, and then, when the latter oscillates back to the shed without releasing its hold of the wire-head, drives the wire into the shed, and is then lifted out of the notch by striking the edge of the wire-box, sloped up for that purpose, and releases the wire; and then oscillates forward again to seize another wire, and so on. The lathe in the meantime works backward and forward without meeting any obstruction, and without any detachment or separation of its parts. Very little modification had to be made in the cams, and the whole apparatus, or wire movement, as it is called, seems more simple than it was before, either in Bigelow's or Weild's loom. This contrivance, when actually applied to the looms, worked to perfection, and enabled the weaver to drive his loom to its utmost capacity.

The patent points out and the drawings illustrate various ways of arranging the wire-bar and the reciprocating-slide which carries the latch. Thus, the outer end of the wire-bar having to be pivoted to some centre for its oscillating motion, it is shown that it may be pivoted to the outer end of the lay or shuttle-box, or to the outer end of the breast-beam, or to a vertical shaft or post—all these devices except the first being in common use in the Bigelow or Weild looms, and being mechanical equivalents of each other. So it is shown that the pushing-slide, which carries the latch and rides on the wire-bar like a saddle, may be operated either by being connected with a driving-slide, or the extension of the breast-beam by means of a cross-bar passing through a mortise in the driving-slide, or by being directly connected with the arm or lever producing the reciprocating movement.

The patent has five claims, only the fifth of which is relied on in this case, which is as follows:

"In combination, the lay and its rigid shuttle-box, the pivoted vibrating wire-trough, the reciprocating driving-slide, and the latch moving thereon, the latter being operated by the wire-box, the combination being and operating substantially as described."

With the explanation of the invention already given, the meaning of this claim is quite obvious. If any explanation of it is needed, it can be readily derived from the body of the specification. The combination contains five elements: first, the rigid lay and shuttle-box; second, the pivoted oscillating or vibrating trough; third, the reciprocating-slide riding on the trough; fourth, the latch for taking and holding the wire; fifth, the operation or lifting of the latch by striking the wire-box.

Nothing further is necessary to be said in order to dispose of the defense, which was strenuously urged, and to which the court below attached much importance, that the specification was insufficient in its description of the invention sought to be patented, and failed to show any means of applying it to existing looms; and that independent invention would have to be exercised to make it a practical working apparatus as an attachment of such looms. We shall, therefore, dismiss that branch of the argument.

It is further argued, however, that supposing the devices to be sufficiently described they do not show any invention, and that the combination set forth in the fifth claim is a mere aggregation of old devices already well known, and, therefore, it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed, one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skillful persons. It may have been under their very eyes; they

may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who *was* the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.

The next contention of the defendants which we shall consider is their allegation that Webster was not the first and original inventor of the thing patented, but that he was anticipated therein by E. K. Davis.

On this point we think it very clearly made out, though we shall not go into much detail in commenting upon the evidence, that the whole substance of the invention was conceived by Webster, and exhibited by him in a drawing as early as the winter of 1865–66, long before Davis entertained any idea of it. The original of this drawing is in existence, and was produced in evidence, and is well authenticated. It exhibits the rigid lay; the wire-trough pivoted in two different positions, on a post near the extremity of the breast-beam, and to an arm projecting from the extremity of the lay; the driving or pushing slide, riding on the trough, with a projection indicating

the latch or other device for operating the wire, and even the cams to give the requisite movements. It also shows the wire-box, and the position of the end of the trough in relation thereto, the same as exhibited in the patent. In March, 1868, Webster exhibited his drawing to Davis and others, and explained it to them as representing a lay having a rigid shuttle-box, a driving-slide and latch moving upon a vibrating trough, the latch being operated by the wire-box. Davis was about that time engaged in making an improvement on the Weild loom before referred to, with a sliding shuttle-box, and parallel bars instead of a trough for the wire to slide between, and a pin for it to rest on. In July, 1868, he applied for a patent for this improvement, and obtained a patent in February, 1869. In that year Webster sent drawings to Weild in England to get out a patent for his invention in that country, but Weild declined to undertake it. These drawings show the entire invention in detail. In November, 1869, Webster having heard that the defendants were going to alter their Bigelow looms to Weild looms, sought an interview with them in order to induce them to adopt his improvement. He met one of the defendants and showed his original drawing, but without result. In April, 1870, he had another interview with them, and also with Davis, at their carpet works in New York. He exhibited his original drawing and the drawings which he had prepared for England. Davis advised the defendants that Webster's plan was no improvement on the Weild loom. He was evidently anxious that they should adopt his improvement, for which he had already got a patent. Further interviews took place, but the defendants declined to adopt Webster's improvement, and adopted Davis's in part—so much of it, at least, as the sliding shuttle-box. It is clear from the facts that up to this time Davis did not pretend to be the inventor of Webster's arrangement. But in the spring of 1870 Davis commenced to make a new loom, which he did not get into complete operation until the latter part of 1871. This is called the Sterling loom, and was made for the defendants. When

completed it had in it the improvement claimed by Webster and shown in his patent. At what time this particular form was adopted is not shown.

It is contended by the defendants that Davis had conceived the idea of using a rigid lathe with his wire-bar in the early part of 1868, and that in the model which he prepared at that time for obtaining his patent he exhibited the same latch devised by Webster, and operated in the same way by contact with the wire-box; and that he showed to the witness Crossley, by pinning his sliding shuttle-box fast to the lay, how it could be used with a rigid lay and shuttle-box. Then why did he not claim the whole device when Webster exhibited it to him? Why did he advise the defendants that Webster's arrangement was no improvement on Weild's? But if it were true that he did show these things in his model, and had he shown a trough instead of parallel bars, and if it were true that he regarded the idea as anything more than a possibility, and that he did in fact contemplate it as a perfected and practicable arrangement, so as to amount to invention, the question would still remain whether he or Webster was the first inventor. Both may have been original inventors, but only one of them could be the first. If Davis had put the invention into practical form and operation more than two years before Webster applied for his patent, then the patent would be void by reason of prior use. But the evidence is conclusive that he never undertook to put it into practical form until he made the Sterling loom, which was only commenced in 1870. Webster's application for his patent was made in June, 1870. Though this was proved without objection, and substantially conceded, the defendants say that it does not appear what the application was, nor how much it was altered before the patent was issued. This argument cannot avail, for the application is a public record, the contents of which the defendants and all others are presumed to know; and since they had it in their power to produce it, and did not, it must be presumed that it would not have served their purpose, but corresponded with the patent.

The defense of prior use for two years, therefore, is not sustained; and the question comes back to simple priority of invention. Conceding that Davis was an original inventor, the earliest point of time that he can be regarded as such was in the spring of 1868. But Webster had invented it before that time and had made a drawing of it which, in March, 1868, he exhibited and explained to Davis. An invention relating to machinery may be exhibited either in a drawing or in a model so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it. There is no doubt that Davis understood Webster's drawing, and he did not then claim that the invention belonged to himself.

The evidence relating to loom number 50 leads in the same direction. This was a loom of the defendants which they commenced to alter in the latter part of 1870. Davis was not employed to make the alterations on this loom. According to Webster's testimony—which must, of course, from his relation to the case, be received with caution, but which seems to be corroborated by subsequent circumstances—Davis informed Webster at the latter's house, on Christmas day, 1870, that loom 50 had been taken down to be changed to what they had seen and explained to them in the office, (referring to Webster's previous explanation of his drawings,) and that he (Davis) had told Higgins that if he took that loom down and changed it to what they had seen Webster have, and explained in the office, it would be a Webster wire motion. In April Webster called, as he says, at the defendant's store, and saw N. D. Higgins, and they talked about this loom, and Webster claimed it as his invention, and told Higgins that he (Higgins) had seen the drawing of it at his house and mill. It is not seriously denied that this loom was made substantially on Webster's plan.

Another circumstance seems to us as having much weight in this connection. It was found that the loom number 50 and the Sterling loom, when completed in 1871, worked with

wonderful success; sometimes as many as sixty yards being woven on one loom in ten hours. If Davis was the inventor of the wire motion applied to these looms, why did he never apply for a patent for it? He was already a patentee of a different and inferior apparatus. He knew all about the method of going about to get a patent. He belonged to a profession which is generally alive to the advantages of a patent right. On the hypothesis of his being the real inventor his conduct is inexplicable.

There is a great deal of evidence *pro* and *con* to which we have not adverted. It must suffice to say that we are satisfied from the examination we have given to it that Webster is entitled to the claim of being the first inventor.

The appellants' counsel has raised the question whether the defense of prior invention can be set up under the answer, which does not state it in the manner required by the statute. It denies generally, it is true, that Webster was the original and first inventor of the improvement claimed in the patent, and specifies certain letters-patent issued in this country and in England in which it is alleged that the said invention, or material and substantial parts thereof, was described before any invention made by Webster, which is sufficient foundation for adducing such patents in evidence; but it does not give the name and residence of any person alleged to have invented the thing patented prior to Webster; it only states that it was used by and known to Davis. It is possible that this objection to the evidence would have been available if it had been taken in season. But we are not referred to anything to show that it was taken in the court below, or before the examiner when the witnesses were examined. In Roemer *v.* Simon, 95 U. S., 220, we held that the failure to interpose such objection before the final hearing is a waiver of the required notice in an equity suit.

It remains to consider the question of infringement. The defendants deny that they infringe the fifth claim of the patent, which is relied on by the complainants.

At the commencement of the cause, when a preliminary injunction was applied for, the defendants put in affidavits contesting the charge of infringement, but upon a very different ground from that on which the defense is now based. Then they relied on a non-user of the last element of the combination, the operation of the latch by contact with the wire-box; now they rely on a different construction of the third element —the reciprocating driving-slide—from that given to it by the complainants. They say that they do not use that element, construed as they construe it. The position originally taken is abandoned.

Nevertheless it will throw light on the subject to see what the defendants said on the occasion referred to. It will at least bring their present position to the test of a first judgment formed by themselves at a time when it was very much to their interest to find discrepancies between what they used and what the patent contained. Two affidavits were put in by the defendants at that time, one made by both the defendants jointly, and one by their superintendent, Mr. Duckworth. A previous suit brought on Webster's patent against the New Brunswick Carpet Company, in which the defendants or, at least, their machinist, Davis, had taken much interest, had just terminated in a decree sustaining the patent, rendered by Judge Nixon in the Circuit Court for the District of New Jersey. The defendants in their affidavit dated June 24, 1874, say:

"That at the time defendants procured the looms referred to in the affidavits on the part of complainants in this suit, and used thereon tops of wire-boxes as cams to disengage the latches from shoulders on the heads of the wires, they did not know or suppose that William Webster, or any one else except themselves and E. K. Davis, had a patent covering any part, or combination of parts, contained in said looms * * * The Sterling loom, the number 50 loom, and the three other Bigelow looms mentioned in the affidavits on the part of the complainants were all procured and put in operation with the tops of the wire-boxes, as cams to disengage the latches from

the wire-heads, a long time prior to the issuing of the Webster patent, on which this suit is brought, and before defendants knew that said Webster had applied for said patent. The first that said defendants knew or supposed that there was anything in any of said looms covered by letters-patent granted to said Webster was during the progress of this suit against the New Brunswick Carpet Company, referred to in said affidavits; and while the testimony was being taken therein, when they heard that a claim of that kind was being made, and on further inquiry were informed that said Webster would probably sustain his right to the combination mentioned in the fifth claim of his patent, on which said suit was pending, and that the use of the top of the wire-box as a cam to disengage the latch from the shoulders of the wire-heads was one of the elements or parts of that combination. After consulting counsel on the subject they concluded that, to avoid any question of doubt on that subject, they would have all their looms which contained such tops to the wire-boxes altered by having such tops entirely removed, and having other provision made for operating the wires. They accordingly had such alterations made, which were all completed by the middle of May, 1874, since which time they have not had any looms, or used any looms, employing the top of the wire-box as a cam to disengage a latch from a wire-head, or for opening a latch to disengage from a wire-head, or to support a latch away from or out of contact with the wire-heads in its journey from one end of the box to the other, or to permit a latch to descend and catch a wire-head in any way, or for any other purpose. That they have not since the time of said alterations used, in any loom or looms, the top of a wire-box to lift or support, or to in any way operate or participate in the operation of a latch, and that they do not expect to use any such top of a wire-box hereafter, but intend not to do so."

The fact that this mode of resisting the charge of infringement is now abandoned furnishes very fair presumptive evidence of two things: first, that the substituted device for operating the latch was a mere equivalent of the wire-box in

that regard; and secondly, that the construction of the fifth claim, on which they now take their stand, could not have been a very obvious one.

That construction is that the third element in the combination of the fifth claim of Webster's patent, and which is there called "the reciprocating driving-slide," refers not to the slide which rides upon the trough or wire-bar and carries the latch, (which they do use,) but to the slide which rides upon the breast-beam and communicates the reciprocating motion to the other, (which they do not use.) It is undoubtedly true that in the body of the specification, where the patentee is describing the joint use of these slides, he does designate the slide on the breast-beam as the reciprocating or driving slide, and that on the trough as the withdrawing and pushing slide. But it is apparent that both of these slides are, in fact, reciprocating and driving slides. The one on the trough has a reciprocating motion and drives the wire into the lay. And when, as the patent points out, the other slide is not used—that is to say, when the slide on the trough is directly connected with the motive power or device which gives the reciprocating motion—it takes the place of both. The specification states this in so many words. It says: "Figure 4 represents a modification of the invention. The withdrawing and pushing slide B^1 in this case becomes the driving-slide." Again: "Figure 7 represents a side view of the driving-slide B^1, its pin B^2, to which power is applied, and the withdrawing and transfer latch C and pusher C^1 attached to the slide." These figures relate to that form of the invention in which the slide on the breast-beam is not used.

Now, if we examine the language of the claim it seems to us that all doubt as to its meaning is removed. It reads thus: "In combination, the lay and its rigid shuttle-box, the pivoted wire-trough, *the reciprocating driving-slide, and the latch moving thereon*, the latter being operated by the wire-box, &c." Obviously the reciprocating driving-slide here referred to is that slide on which the latch moves, and that is the slide which rides

on the trough, and which is the only slide used in one modification of the invention. It can hardly be supposed that the patentee intended to make the other slide, which he showed could at any time be dispensed with, an indispensable element in his claim. It would have rendered the claim a practical nullity. The important thing was the slide which rides on the trough.

The argument of the defendants' counsel on this subject is very ingenious and plausible; but we are forced to the conviction that the slide intended in the combination is that which is indispensable to the operation of the apparatus. And this must have been the conviction of the defendants themselves, as well as of their counsel, when they made the affidavit before referred to.

In conclusion, our judgment is that Webster invented the combination described in the fifth claim of the patent; that the invention is sufficiently described in the specification to meet the requirements of the law; that it was not anticipated by any prior patent or invention; that it was never in public use or on sale for more than two years before the patent was applied for; and that the defendants have infringed it.

The decree of the Circuit Court must be reversed and the cause remanded with instructions to enter a decree in favor of the complainants, and to take such further proceedings as law and justice may require.

REVERSED.

THE AMOSKEAG NATIONAL BANK v. THE TOWN OF OTTAWA; AND AUGUSTUS T. POST v. THE BOARD OF SUPERVISORS OF KENDALL COUNTY.

May 8, 1882.

1. Whether a seeming act of the Legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.
2. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.

3. An act of the Legislature of a State which has been held by its highest court not to be a statute of that State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence between different parties, to be a law of the State, although referred to in later statutes of the State as an existing law, and assumed to be such in earlier cases in the State court, in which its validity was not, and by the settled practice of that court could not be, controverted.
4. The act of the General Assembly of Illinois of February 18, 1857, purporting to authorize the issue of certain municipal bonds, is of no force or effect, by reason of its not appearing by the legislative journals to have been passed as required by the Constitution of 1848.
5. Under the statute of Illinois of February 12, 1849, copies of the original daily journals kept by the clerks of each house of the Legislature, made by persons contracted with or employed for the purpose, in well-bound books furnished by the Secretary of State, and afterwards deposited and kept in his office, are official records, copies of which certified by him are competent evidence.
6. The printed journals of either house of a Legislature, published in obedience to law, are competent evidence of its proceedings.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Milton Hay, *D. T. Littler*, *S. B. Perry*, and *G. S. Eldredge*, for plaintiff in error.

P. Phillips and *T. Lyle Dickey*, for defendants in error.

GRAY, J.—These actions are brought upon municipal bonds purporting to have been issued under an act of the General Assembly of Illinois of February 18, 1857. The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at October Term, 1876, and the principles then affirmed must control the present decision. (See South Ottawa *v.* Perkins and Supervisors of Kendall *v.* Post, 94 U. S., 260.) Those principles may be summed up as follows:

First. By the law of the State of Illinois as often declared by the Supreme Court of that State, before as well as after the execution of the bonds in suit, the provisions of the Con-

stitution of 1848, requiring each house of the Legislature to keep and publish a journal of its proceedings, and on the final passage of all bills to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the Constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the act is void.

Second. Whether a seeming act of the Legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.

Third. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.

Fourth. An act of the Legislature of a State which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the State.

Fifth. That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued.

It was accordingly held that the act of the General Assembly of Illinois of February 18, 1857, under which the bonds in suit were issued, having been adjudged by the Supreme Court of that State in 1870, in the cases of Ryan *v.* Lynch, 68 Ill., 160, and Miller *v.* Goodwin, 70 Ill., 659, upon proof that the journals did not show it to have been enacted in conformity with the requirements of the Constitution, to have never become a law, and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States.

The weight of those decisions as authoritative expositions of

the Constitution of the State is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. (Elmwood *v.* Marcy, 92 U. S., 289; East Oakland *v.* Skinner, 94 U. S., 255.)

Nor is it of any importance that the act of 1857 had been assumed to be an existing law in Dunnovan *v.* Green, 57 Ill., 63, and in Force *v.* Batavia, 61 Ill., 99; for in each of those cases the validity of the statute was not controverted, and by the established practice of that court no evidence of the contents of the journals could be considered on appeal which had not been produced and made part of the case in the court below. (Illinois Central Railroad *v.* Wren, 43 Ill., 77; Bedard *v.* Hall, 44 Ill., 91; Grob *v.* Cushman, 45 Ill., 119; People *v.* Dewolf, 62 Ill., 253, 256; Binz *v.* Weber, 81 Ill., 288, 291.)

The copies of the journals certified by the secretary of State, and the printed journals published in obedience to law, are both competent evidence of the proceedings in the Legislature.

By virtue of the statute of Illinois of February 12, 1849, *

* By the Constitution of Illinois of 1848, article 3, section 39, "the General Assembly shall provide by law that the copying, printing, binding and distributing the laws and journals shall be let by contract to the lowest bidder."

By the statute of January 16, 1836, in force at the time of the adoption of that Constitution, the journal of each house of the General Assembly was required to be "kept in well-bound volumes;" the clerks of each house were required to furnish daily to the public printer "a copy of the journal kept by them respectively," and after the final adjournment to "deposit the original journals kept by them respectively with the secretary of State;" and the secretary of State was required to "superintend the printing of the journals." (Statutes of Illinois of 1839, p. 551; Revised Statutes of Illinois of 1845, ch. 84, sec. 3.)

By the statute of February 12, 1849, the secretary of State was required before the meeting of the General Assembly to publish an advertisement "inviting proposals for copying the laws, joint resolutions, and journals of the General Assembly," and to "give the contract to the lowest competent responsible bidder," and was also required "to furnish a well-bound book, in which the journals shall be copied," and, in case the person contracting for the copying should fail to perform his contract, to cause the same to be done by some competent person. (2 Stats. of Illinois, Scates's ed., p. 734.)

the copies of the original daily journals kept by the clerks of the two houses, made by persons contracted with or employed for the purpose as authorized and directed by that act, (though not sworn public officers,) in well-bound books furnished by the secretary of State pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which certified by him are admissible upon settled rules of evidence, as well as by the decision of the Supreme Court of Illinois in Miller *v.* Goodwin, above cited; and neither the competency nor the effect of such copies is impaired by the loss or destruction of the daily journals or minutes.

The remark of the judge delivering the opinion in Illinois Central Railroad *v.* Wren, 43 Ill., 79, "We are not aware of any law which makes the printed journals evidence of the contents of the original," was but *obiter dictum*, (for the case was decided upon the ground that no copy whatever of the journal had been made part of the case before the court,) and is in conflict with the general current of decision in that court and in this. (People *v.* Campbell, 3 Gilman, 466; Prescott *v.* Trustees of Illinois and Michigan Canal, 19 Ill., 324; Happel *v.* Brethauer, 70 Ill., 166; Watkins *v.* Holman, 16 Pet., 25, 55, 56; Bryan *v.* Forsyth, 19 How., 334; Gregg *v.* Forsyth, 24 How., 179.)

For these reasons the act of February 18, 1857, under which all the bonds in suit purport to have been issued, must be held to be of no force or effect, and the plaintiffs can maintain no action on the bonds. Upon the attempt made at the argument to support their validity in the first case under the statute of March 6, 1857, and in the second case under the statute of November 6, 1859, it is enough to say that there is nothing in the record to show that either of those statutes was ever complied with by the defendant in issuing the bonds, or relied on by the plaintiff in purchasing them. Judgments affirmed.

AFFIRMED.

THE COUNTY COURT OF RALLS COUNTY AND THE JUDGES THEREOF v. THE UNITED STATES EX REL. JOSEPH M. DOUGLASS.

May 8, 1882.

1. Where coupons of questioned validity have been merged into judgment and a mandamus has been issued to enforce the payment of such judgment, no defenses can be set up against the mandamus which go to the validity of such coupons, their validity being conclusively established by such judgment.
2. Where a legislative act authorizes a county to issue coupon bonds, the power to tax in order to pay them necessarily results therefrom, in the absence of a special limitation.
3. A limitation of one-half of one per cent. on the power to tax "to defray the expenses of the county" is not such a special limitation.
4. A State law purporting to repeal the power of the county to levy taxes for the payment of its bonds is void.
5. The defense that the bonds were not actually delivered till after the statute requiring registration went into effect cannot be set up after judgment and against the mandamus.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

H. A. Cunningham, for plaintiffs in error.

John H. Overall, for defendants in error.

WAITE, C. J.—Section 29 of the act to incorporate the St. Louis and Keokuk Railroad Company, approved February 16, 1857, is as follows:

"It shall be lawful for the County Court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of said county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such County Court may appoint an agent to represent the county, vote for it, and receive the dividends."

Under this authority the County Court of Ralls county subscribed $200,000 to the stock of the company, and, during the

years 1870 and 1871, issued bonds of the county to pay the subscription. Default having been made in the payment of coupons for interest attached to some of these bonds, Douglass, the relator, brought suit against the county, in the Circuit Court of the United States for the Eastern District of Missouri, for their recovery, and on the 16th of October, 1878, obtained judgment for $17,158.43. That judgment was affirmed here at the present term in the case of Ralls County v. Douglass.

After the judgment was rendered in the Circuit Court, the present suit was begun to require the County Court, by mandamus, to pay the amount due out of moneys in the treasury of the county; or, if that could not be done, to raise the necessary means by the levy of a special tax. In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to all these defenses, it is sufficient to say it was conclusively settled by the judgment which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and, as such, entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri in State v. Rainey, 12 Cent. Law Jour., 587, and the principle on which the decision rests is elementary.

The present suit is in the nature of an execution, and its object is to enforce the payment, in some way provided by law, of the judgment which has been recovered. The only defenses that can be considered are those which may be presented in the proper course of judicial procedure against the collection of valid coupons, executed under the authority of law and reduced to judgment. While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appro-

priate ways, notwithstanding the change in the form of the debt.

This brings us to consider what may be done to enforce the judgment. The County Court insists that its power of taxation is limited to the levy of an annual tax of one-half of one per cent. on the taxable property in the county, and that as this tax has always been levied at the times provided by law, the duty of the court in the premises has been fully performed. The relator, on the contrary, claims that the limit of one-half of one per cent. only applies to taxes to defray the general expenses of the county, and that if the fund produced in this way is not sufficient to enable the county to pay his judgment, an additional tax must be levied and collected specifically for that purpose. This presents the real controversy we have to settle.

When the charter of the St. Louis and Keokuk Railroad Company was granted, when the subscription was made to its stock by the County Court, and when the bonds to pay the subscription were put out, there were limitations on the powers of the County Court for the levy of taxes to defray the expenses of the county which confined the tax for a year to one half of one per cent. or less. The question we have to consider is not whether this power has been reduced below that limit, but whether the limit is applicable to the obligation of the county created under the authority of the particular charter now in question.

It must be considered as settled in this court that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligation to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary

obligations through the instrumentality of taxation. This general doctrine has been so many times announced that it cannot be necessary now to do more than refer to Loan Association *v.* Topeka, 20 Wall., 655, where the opinion was given through Mr. Justice Miller, and United States *v.* New Orleans, 98 U. S., 381, in which Mr. Justice Field, speaking for the entire court, went elaborately over the whole subject. In United States *v.* Macon County, 99 U. S., 589, there was a special limitation on the power to tax coupled with the authority to contract, and because the Legislature saw fit to say how much of a tax in addition to that otherwise provided might be levied to meet the new and extraordinary obligation which was contemplated, it was held that a prohibition against anything more was necessarily to be inferred.

In the present case there is no such special limitation. The defense rests entirely on the power to tax to "defray the expenses of the county," which it has always been the policy of the State to restrict. The County Court was, however, not only authorized to issue bonds, but to "take proper steps to protect the interest *and credit* of the county." It would seem as though nothing more was needed. As the commercial credit of the county, in respect to its negotiable bonds, could only be protected, under ordinary circumstances, by the prompt payment of both principal and interest at maturity, and there is nothing to show that payment was to be made in any other way than through taxation, it necessarily follows that power to tax to meet the payment was one of the essential elements of the power to protect the credit. If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to to contract. The one power is as much express as the other. Here it seems to have been understood by the Legislature that the ordinary taxes might not be enough to enable the county to meet the extraordinary obligation that was to be incurred,

and so, without placing any restriction on the amount to be raised, the County Court was expressly empowered to do *all* that was necessary to protect the credit of the county. We cannot agree to the position taken by the counsel for the plaintiff in error, that this power was exhausted when the bonds were issued to pay the subscription. The faith of the county pledged by the subscription was kept when the bonds were put out, but only by transferring the credit to be protected from the subscription to the bonds. The subscription was paid by the bonds, but the obligation to pay the bonds, principal and interest, when they matured, was legally substituted.

We have been referred to many instances in which statutes were passed authorizing special taxes to pay bonds which had long before been issued under original authority like that contained in the present charter, but this does not, in our opinion, change the case. Such legislation seems to have been procured out of abundant caution, but in none of the numerous cases in the Missouri reports, to which our attention has been directed, is it anywhere said that the requisite tax could not have been levied but for such legislation. In State *v.* Dallas County, 72 Mo., 330, and some other cases before, it was held that such a provision as that contained in the charter of the St. Louis and Keokuk Railroad Company, now under consideration, was repealable; but none of the judges whose decisions have been published intimate even that if there had been no repeal there could not be a tax. It has been many times decided that County Courts in Missouri, while acting as the governing bodies of their counties, which are nothing more than political subdivisions of the State, have no implied powers. Authority must be conferred on them by law to act, or they cannot act at all. This is not peculiar to the county officials of Missouri. The same principle applies to all municipal organizations in all the States, and in this respect it matters but little whether the organization exists as a full corporation or a *quasi*-corporation. The point is that all such organizations for local government, by whatever name they may be called, have only such powers

as the Legislatures of their respective States see fit to delegate to them. But all powers that are delegated may be exercised in any proper way and at all proper times.

This makes it unnecessary to consider whether the power of taxation given by the general railroad laws in force when these bonds were made can be invoked in aid of the relator. It is enough that we find sufficient power in the charter of the company itself, without looking elsewhere. We ought, perhaps, to say, however, that the remark in the opinion in United States *v.* Macon County, 99 U. S., 591, to the effect that the power of taxation granted by the general railroad law was confined to subscriptions authorized by those laws should be construed as made in a case where a special limitation on the power to tax was contained in the charter which authorized the issue of the bonds then in question, and that it was only necessary to decide that the railroad laws did not enlarge that power. The language there used may be broader than on further consideration we shall be willing to agree to. That case is authority on this point only to the extent it was necessay then to decide.

It follows from this that all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the County Courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well-settled rule of decision in this court, the Circuit Court had authority by mandamus to require the County Court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent. The fact that money has once been raised by taxation to meet the payment which has been lost, is no defense to this suit. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county and not on the creditors. The writ as issued was properly in the alternative to pay from the money already raised, or levy a tax to raise more. It will be time

enough to consider whether the command of the writ, that the court *cause the tax to be collected*, is in excess of the requirements of the law, when the justices of the court are called on to show why they have not obeyed the order. The same may be said of the order to draw the warrant on the treasurer. As at present informed we see no irregularity in anything that has been done.

The judgment of the Circuit Court is affirmed and the case remanded, with leave to the court to make such changes in the order originally entered as may have become necessary by reason of the time that has elapsed since the writ of error was brought.

AFFIRMED.

THE COUNTY COURT OF RALLS COUNTY AND THE JUDGES THEREOF v. THE UNITED STATES EX REL. CHARLES L. GEORGE.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This judgment is affirmed on the authority of The County Court of Ralls County *v.* The United States ex rel. Douglass, just decided, from which it cannot be distinguished. The cause remanded, with an order like that in No. 277, (*ante*, p. 871.)

AFFIRMED.

THE COUNTY COURT OF LINCOLN COUNTY AND THE JUDGES THEREOF v. THE UNITED STATES EX REL. VESPASIAN WARNER; SAME v. THE UNITED STATES EX REL. HENRY C. MCPIKE; AND SAME v. THE UNITED STATES EX REL. JOSEPH M. DOUGLASS.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

WAITE, C. J.—These cases differ only from that of The County Court of Ralls County *v.* United States ex rel. Douglass, just decided, in one particular. Here the bonds were not

actually delivered until after the statute requiring registration went into effect, though they were in the hands of the agent for delivery before. It is contended that on this account no special tax can be levied for their payment, notwithstanding the judgment that has been recovered upon them. In our opinion this is a defense that cannot be taken advantage of after judgment. As has been said in the Ralls-county case, it was conclusively settled by the judgment, which this proceeding is to carry into execution, that the coupons sued on were binding obligations of the county, duly created under the authority of law, and as such are entitled to payment out of any fund that can lawfully be created for that purpose.

The judgments are affirmed and the several causes remanded, with orders like that in No. 277, (*ante*, p. 871.)

AFFIRMED.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY v. THE UNITED STATES.

May 8, 1882.

1. The court, after reviewing the congressional legislation on the subject of bridging the public waters of the United States, and especially the act passed May 3, 1869, authorizing the construction of the Newport and Cincinnati bridge, which contained a reservation of the right to withdraw assent in case the free navigation of the river shall be substantially and materially obstructed, decides that the United States are not liable for the cost imposed upon the bridge company by the alterations made necessary by the subsequent act of March 3, 1871, the right to impose such requirements being a limitation which formed a part of the original grant.
2. And this is true notwithstanding any rights conferred upon the bridge company by State law, such rights being subject to the supreme power of Congress.
3. The question whether a bridge is such an obstruction to navigation as to justify Congress in withdrawing a consent previously given to its erection is a question to be decided by Congress, and is not a judicial question for the courts.

Statement of the case.

4. Although the franchise to erect a bridge is a species of property, yet from its origin its continued existence was dependent on the will of Congress, and it might be altered or abolished without making compensation

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

On the 5th of February, 1868, the General Assembly of Kentucky passed an act to incorporate the Newport and Cincinnati Bridge Company, with power to build a bridge across the Ohio River between Newport and Cincinnati. This charter provided "that the said bridge shall be constructed so as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize."

On the 3d of April, in the same year, the General Assembly of Ohio enacted a statute authorizing the creation and organization of corporations to build bridges across the same river. This act, in order that the bridges to be built might not obstruct navigation, provided that they should be erected "in accordance with the provisions of an act of Congress approved July 14, 1862, entitled 'An act to establish certain post-roads,' or of any act that Congress may hereafter pass on the same subject." Its eleventh section is as follows:

"SEC. 11. That any such company may fix or change the span and altitude of any bridge which it may erect and construct across the Ohio River; provided that the span of any such bridge be not less than three hundred feet in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans, and the height of the bridge in the centre of the span over the main channel shall not be less than one hundred feet above the surface of the water at low water, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high-water mark as may be provided in any act of Congress now in force, or which may hereafter be passed; but this section shall not apply to any bridge built with a draw, in accordance with the provision of an act of Congress ap-

proved July 14, 1862, entitled 'An act to establish certain post-roads,' or any act that Congress may hereafter pass upon the subject."

On the same day this act was passed the Newport and Cincinnati Bridge Company was organized under it in Ohio to build a bridge between Cincinnati and Newport. Afterwards, on the 16th of April, 1868, the Kentucky and Ohio companies, pursuant to provisions in their respective charters, were consolidated, and became one corporation, with the general powers which the divisional companies originally possessed.

The material provisions of the "act to establish post-roads," passed July 14, 1862, ch. 167, secs. 3 and 4, 12 Stat., 570, are as follows:

"SEC. 3. And be it further enacted, That it shall be lawful for any other railroad company or companies whose line or lines of road may now or shall hereafter be built to the Ohio River above the mouth of the Big Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.

"SEC. 4. And be it further enacted, That any bridge erected under the privileges of this act may, at the option of the company or companies building the same, be built either as a draw-bridge, with a pivot or other form of draw, or with unbroken or continuous spans: Provided, That if the said bridge shall be made with continuous or unbroken spans, it shall not be of less elevation than ninety feet above low-water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge covering the main channel of the river be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge

shall be parallel with the current of the river as near as practicable: And provided also, That if any bridge built under this act shall be constructed as a draw-bridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or first pier of the draw: And provided also, That said bridge shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under the permanent spans of said bridge, except that said draw shall not be required to be opened when engines or trains are passing over said bridge, or when passenger trains are due; but in no case shall unnecessary delay occur in the opening of said draw after the passage of said engines or trains."

On the 3d of March, 1869, Congress passed the following joint resolution:

"Joint resolution giving the assent of the United States to the construction of Newport and Cincinnati bridge.

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress be, and the same is hereby, given to the erection of a bridge over the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio: Provided, That such bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with

the conditions and limitations of an act entitled 'An act to establish certain post-roads,' approved July fourteenth, eighteen hundred and sixty-two. That said bridge, when completed in the manner specified in this resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States; but Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge."

After the passage of this resolution the consolidated company began the erection of a draw-bridge with a pivot draw, and expended a large amount of money in the undertaking, but on the 3d of March, 1871, before the structure was completed, Congress passed the following act:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"SEC. 5. That it shall be unlawful for the Newport and Cincinnati Bridge Company, or any other company or person, to proceed in the erection of the bridge now being constructed over the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, and the approaches thereto, unless the said bridge shall be so constructed that the channel span of four hundred feet, as now located, shall have under said span a clear headway at low water of one hundred feet below any point of said channel span, and in such case no draw shall be required in said bridge; all the other spans of said bridge which cover the Ohio River at low-water mark shall have a clear headway of not less than seventy feet above low-water mark; and the other spans of said bridge extending to each shore may be made of less elevation than seventy feet above low-water mark, to accommodate a regular grade for the approaches to said bridge.

"And when the foregoing requirements shall have been complied with by the said Newport and Cincinnati Bridge Com-

pany, the location of said bridge, its structures and approaches, shall thereupon be deemed to be legalized, and declared to be lawful structures, and shall be recognized and known as a post-route.

"The plans for changes in said bridge made necessary by this act shall be submitted by said company to the Secretary of War for his approval. And in the event of the bridge company making the changes provided for in this act, it shall be lawful for said company, after they shall have made the changes in said bridge, and the approaches thereto, as herein provided, to file their bill in equity against the United States in the Circuit Court of the United States for the Southern District of Ohio, and full jurisdiction is hereby conferred upon said court to determine, first, whether the bridge, according to the plans on which it has progressed, at the passage of this act, has been constructed so as to substantially comply with the provisions of law relating thereto; and second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made; and if the said court shall determine that the United States is so liable, and that the said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as hereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by this act to be made.

"And the said court is hereby further authorized and required to proceed therein to final decree as in other cases in equity. And it shall be lawful for either party to the said suit to appeal from the final decree of the said Circuit Court to the Supreme Court of the United States as in other cases, and the Supreme Court shall thereupon proceed to hear and determine the said case and make a final decree therein; and thereupon, if such decree shall be in favor of said company, the

Secretary of the Treasury of the United States shall, out of any moneys in the treasury not otherwise appropriated, pay to the said company such sum of money as shall by the said Supreme Court be so decreed to be paid to the said company; provided, nevertheless, that no money shall be paid by the Secretary of the Treasury to the said company until the Supreme Court of the United States, upon appeal taken as aforesaid, shall render a final decree in the case in favor of said company."

The company promptly yielded to these new requirements, and, having completed its bridge on the altered plan, brought this suit in equity against the United States in the Circuit Court for the Southern District of Ohio to recover the increased cost. After hearing the Circuit Court dismissed the bill, and from that decree this appeal was taken.

William M. Ramsey, for appellant.

B. H. Brewster, *Attorney-General*, and *S. F. Phillips*, *Solicitor-General*, for appellees.

WAITE, C. J.—The first question which presents itself is whether, on the face of the several acts of Congress, any liability rests on the United States to pay the bridge company the cost of the change that was directed in the plan of its bridge. It cannot be denied that but for the act of 1871 a bridge built according to the original plan would have been a lawful structure which the company could have maintained until Congress withdrew its assent, or required alterations to be made. The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States. (Wilson *v.* Black Bird Creek Marsh Co., 2 Pet., 252; The Wheeling Bridge, 18 How., 421; Gilman *v.* Philadelphia, 3 Wall., 729, 731; The Clinton Bridge, 10 Wall., 462; R. R. Co. *v.* Fuller, 17 Wall., 569; Pound *v.* Turck, 95 U. S., 464; Wisconsin *v.* Duluth, 96

U. S., 387.) That the Ohio is one of the navigable rivers of the United States must be conceded. It forms a boundary of six States, and the commerce upon its waters is very large.

No question can arise in this case upon what the States have done, for both Ohio and Kentucky required the company to comply with the regulations of Congress. Neither are we called on to determine what would have been the rights of the company if in the original license no power of future control by Congress had been reserved. The joint resolution on which the company relies contains this distinct provision: "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." An examination of the legislation of Congress in reference to the bridging of streams shows this to have been at that time a new provision. It had appeared but once before, and then in an act passed at the same session of Congress, February 19, 1869, ch. 37, 15 Stat., 272, authorizing a bridge across the Connecticut at Middletown.

The first enactment by Congress on this general subject is found in the act making appropriations for the Post-office Department, August 31, 1852, ch. 111, secs. 6 and 7, 10 Stat., 112, which declared the bridge across the Ohio at Wheeling then existing to be a lawful structure. This act simply gave the bridge company leave to maintain a bridge already built, and reserved no power of future control. Next followed, ten years after, the act of July 14, 1862, ch. 167, 12 Stat., 569, which legalized a bridge then in the course of construction across the Ohio at Steubenville, and contained the general provisions as to bridging the Ohio above the mouth of the Big Sandy referred to in the joint resolution of March 3, 1869. In this act, also, there was no reservation of power by Congress. The next was an act of February 17, 1865, ch. 38, 13 Stat., 431, by which the act of July 14, 1862, was amended so as to

authorize the erection of a bridge across the Ohio at Louisville. In this, too, there was no reservation of power, but specific directions were given as to the height of the bridge, the number and location of draws, and the length of spans, and it was expressly provided that all should be so constructed as not to interrupt navigation. The same day another act was passed (ch. 39, Id., 431) by which a bridge across the Ohio between Cincinnati and Covington, then being built in accordance with the laws of Ohio and Kentucky, was declared to be a lawful structure and no power reserved. The was no further legislation of this character until the act of July 25, 1866, ch. 246, 14 Stat., 244, which authorized eight bridges across the Mississippi at and above St. Louis, and one across the Missouri. This act provided that "in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches," and sec. 13 was as follows: "That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the constructian of bridges, is hereby expressly reserved." On the 27th of February, 1867, an act was passed (ch. 98, 14 Stat., 312) to legalize the Clinton bridge across the Mississippi, and on the 21st of February, 1868, (ch. 10, 15 Stat., 37,) the act of July 25, 1866, was extended so as to include a bridge over the Mississippi at La Crosse. On the 6th of July in the same year (ch. 134, 15 Stat., 82) a bridge across Black River in Ohio was authorized. Afterwards, on the 20th of July, (ch. 179, Id., 121,) two other bridges were authorized across the Missouri. In all these acts the power of alteration and amendment was reserved in the exact language employed in the act of 1866.

This brings the history of congressional legislation on the subject of bridging the public waters of the United States down to the session of Congress when the joint resolution in favor of the Newport and Cincinnati company was passed, and when,

as has already been seen, the peculiar form of reservation which appears in that resolution was for the first time introduced. Two licenses were granted at that session which contained this reservation—one to cross the Connecticut, (ch. 37, 15 Stat., 272,) and the other the joint resolution now in question. On the same day the joint resolution was adopted, an act was passed to legalize the bridge across the East River, between New York and Brooklyn, in which "power at any time to alter, amend, or repeal" was in express terms and without any limitation reserved. (Ch. 139, 15 Stat., 336.)

From this it seems to us clear that the peculiar language of the reservation now in question was intended to have a special signification. It had been considered enough before to provide that, "to prevent or remove all material obstructions to navigation," the "right to alter or amend," expressed in the usual form, be reserved. But when power was given to build a bridge below the Big Sandy, such as had before only been built above, it was deemed expedient, in the interest of commerce, to be more specific, and by reserving the power to withdraw the assent of Congress to what might prove to be an obstruction to navigation, to imply at least a reservation of power to make that unlawful which, while the assent continued, would be lawful. That this is what was intended by the language used may fairly be inferred from earlier legislation on the same general subject. Thus, as early as 1805, (ch. 30, 2 Stat., 330,) Congress, in authorizing the grant of leave to a bridge company to build a bridge across a mill pond and marsh in the navy-yard at Brooklyn, N. Y., provided, "that if at any future time it shall appear to the President of the United States that the property of the United States is injured by such bridge, he may revoke the permission granted by him for erecting the same." Afterwards, in 1855, (10 Stat., 680, ch. 198, section 2,) the Secretary of the Navy was authorized to permit another bridge company to connect its bridge with the navy-yard at Kittery, Me., and to have a right of way through the yard to the bridge, but it was pro-

vided that the bridge and the right of way might be discontinued at any time by the Secretary.

It surely could not be claimed that if, under the power reserved in these cases, the President had revoked the permission given in respect to the bridge at the Brooklyn yard, or the Secretary had discontinued that at Kittery, the United States would be either legally or morally bound to make good the loss sustained by the companies, or either of them, on that account. And the reason is that the language in which the power reserved was expressed, clearly implied that all the risks of revocation and discontinuance were to be assumed by those to whom the grants thus limited were made. So here, in assenting to an untried experiment, and one which might prove to be materially detrimental to the navigation of an improtant stream, Congress thought proper to reserve the right to withdraw its assent—revoke its permission—if what might possibly happen should in fact come as the consequence of the new authority which was granted. To "withdraw assent" is the same as to "revoke permission," and what would be implied from one form of expression will be under like circumstances from the other. It is true, in the case of the navy-yards Congress had absolute jurisdiction, and the States were excluded altogether. But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference. In the present case both the Ohio and Kentucky divisional companies were, by express provisions in their respective charters, subjected to this paramount controlling power. The consolidated company was, therefore, prohibited from obstructing navigation more than the laws of the

United States authorized, and was required to build its bridge in accordance with the provisions of the act of 1862, or any other law that Congress might thereafter pass on the subject. Hence the joint resolution of 1869 became, by the operation of both congressional and State enactments, the law on which the rights of the company depend. It was the paramount license for the erection and maintenance of the bridge; and the company, by accepting its provisions, became subject to all the limitations and reservations of power which Congress saw fit to impose.

From this we conclude that the withdrawal by Congress of its assent to the maintenance of the bridge, when properly made, is, for all the purposes of this case, equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of several States upon the subject. If modifications are directed, assent is, in legal effect, withdrawn unless the required changes are made.

It is contended, however, that under the terms of the reservation the assent of Congress could not be withdrawn until it had been in some way judicially ascertained that the bridge, as authorized, either did, in fact, or would, if built, substantially and materially obstruct free navigation. Such, we think, is not the fair meaning of the language employed. In the case of The Wheeling Bridge, 13 How., 519, it was judicially settled in this court that a bridge as constructed did illegally interfere with navigation; but when afterwards Congress, in the exercise of its constitutional authority to regulate commerce, legalized the structure by a legislative enactment, the court held, in 18 Howard, 421, that this act of legislative power removed the objection to the further continuance of the bridge, because, in the opinion of the legislative department of the government, the obstruction which had been erected was no more than those interested in navigation should submit to for the general good. It is to be observed that the question now under consideration is not whether the bridge company has failed to comply with

the requirements of the joint resolution, but whether those requirements are all that the due protection of free navigation demands. The first is undoubtedly a proper subject for judicial inquiry, but the last, as we think, belongs to the legislature. Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges affecting so important a branch of governmental power ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government. As Congress can exercise legislative power only, all its reservations of power, connected with grants that are made, must necessarily be legislative in their character. In the present case the reservation is of power to withdraw the assent which was given, and to direct the necessary modifications and alterations. This was to be done in case the free navigation of the river should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the joint resolution made sufficient provision for the protection of commerce. There is nothing to indicate that any different inquiry was to be instituted to determine whether the assent that had been given should be withdrawn, and as the withdrawal involved an act legislative in its character, the necessary presumption is that the inquiry on which it was to be predicated would be legislative also. No provision is made for instituting proceedings to have the question determined judicially, and even if the courts should determine that the bridge did substantially and materially obstruct navigation, Congress could not be compelled to withdraw its assent to the further continuance of the structure. This is evident from the Wheeling Bridge case, where, as has been seen, congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this court requiring

the abatement of what, but for this assent, would have been, in the judgment of the court, a public nuisance. The withdrawal of assent, therefore, has been left to depend on the judgment of Congress in the exercise of its legislative discretion. For this purpose Congress must make its own inquiries, and determine for itself whether the obstruction that has been authorized is so material and so substantial as to justify, under all the circumstances of the case, an exercise of the power which was reserved as a conitdion of the original grant made.

It is next insisted that if, in the judgment of Congress, the public good required the bridge to be removed, or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation. In the present case the bridge company asked of Congress permission to erect its bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge was found to be detrimental to navigation. This condition was an essential element of the grant, and the company in accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the company got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant by which it was created. In the use of the franchise thus granted the company might, and it was expected would, acquire property. The property thus acquired Congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever in the judgment of Congress it could not

be used without substantial and material detriment to the interest of navigation. A withdrawal of the franchise might render property acquired on the faith of it, and to be used in connection with it, less valuable; but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give. It was optional with the company to accept or not what was granted, but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon.

We are aware that this is a power which may be abused, but it is one Congress saw fit to reserve. For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the Legislature.

What has been done seems to have been with due regard to the rights of all concerned. The Constitution made it the duty of Congress to protect all commerce which extends beyond State lines against obstruction by or under the authority of the States. Two States had been applied to for leave to bridge an important national river. They gave the leave, but made it subject to the constitutional control of Congress. Congress, when applied to, assented to what was wanted, but in express terms reserved to itself the power to revoke what had been done, or require alterations to be made, in case experience proved that the structure which was to be put up substantially and materially interfered with navigation. Under this authority work was at once begun. The next year, in an act making large appropriations for the improvement of rivers and harbors, passed July 10, 1870, (ch. 240, sec. 5, 16 Stat., 227,) the Secretary of War was required to detail three engineers to examine all the bridges erected or in the process of erection across the Ohio, and report to the next Congress

whether, in their opinion, such bridges, or any of them, as constructed or proposed to be constructed, did or would interfere with free and safe navigation; and if they did or would so interfere, to report what extent of space and elevation above water would be required to prevent obstruction, and an estimate of the cost of changing the bridges built, and in the process of building, so as to conform to what was recommended. At the next session the act was passed which required the Newport and Cincinnati Company to alter its bridge, and allowed this suit to be brought for the purpose of determining whether any liability for pecuniary damages had been incurred by the United States to the company for what was done. In this way Congress recognized fully the obligation resting on every government, when it is guilty of a wrong, to make reparation. Exemption from suit does not necessarily imply exemption from liability. Here Congress gave the courts jurisdiction to determine whether a wrong had been done, and, if so, to award compensation in money by the payment of the cost of what had been improperly required. In our opinion Congress did no more than it was authorized to do, and there is no liability resting on the United States to answer in damages.

It is next insisted that by the terms of the statute authorizing the suit the liability of the United States is established, if it shall be determined that the bridge, as far as it had progressed, was "constructed so as to substantially comply with the provisions of law relating thereto." We do not so understand the statute. The language is as follows: "Full jurisdiction is hereby conferred upon said court to determine, first, whether the bridge, according to the plans on which it has progressed, at the passage of this act, has been constructed so as substantially to comply with the provisions of law relating thereto; and second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made; and if the said court shall determine that the United States is so liable, and that said bridge was so being built, then the said court shall further ascertain and

determine the amount of the actual and necessary cost and expenditures, &c."

The rule of damages has been fixed by the statute. As to that the court has no discretion beyond ascertaining the excess of cost. But before damages can be given it must appear both that the United States was in law liable, and that the bridge had been constructed in accordance with the requirements of the law down to the time the change of plan was directed. That the liability of the United States was not made to depend entirely on the fact that the law in respect to the form of the structure had been complied with is apparent, because if such had been the intention of Congress it would have been entirely unnecessary to submit the second question for determination. But the second is as clearly submitted as the first. Damages are not to be given if either is found in favor of the United States. No matter whether the United States was in law liable or not, if the bridge had not been constructed so as substantially to comply with the law, there could be no recovery. That is expressly declared. If, however, it had been properly built, the determination of the question of legal liability became important, and that, in our opinion, depended entirely on the right of Congress, under the Constitution and laws of the United States, to require the change without making just compensation in money.

The decree of the Circuit Court is affirmed.

(Mr. Justice MATTHEWS, having been of counsel, took no part in this decision.)

BRADLEY, J. (dissenting.)—I dissent from the judgment of the court in this case, and will briefly state my reasons. The central reason is that the bridge as it stood, nearly completed, when the act of 1871, directing it to be taken down or altered, was passed, was a lawful structure, and in the lawful possession of the appellants as their private property; and, being such, I think that Congress could not constitutionally require

its demolition or reconstruction without providing for compensation to the owners. By virtue of its plenary power to regulate commerce among the several States, as well as with foreign nations, Congress may undoubtedly require the removal of all nuisances and unlawful obstructions in the navigable rivers of the United States, without giving compensation to any persons who may be incidentally affected. It also has the power to improve the navigation of such rivers; but in making or authorizing improvements, other than the removal of unlawful obstructions, it cannot take private property without complying with that clause of the fifth amendment to the Constitution which declares: "Nor shall private property be taken for public use without just compensation." This proposition would be conceded where property taken for that purpose consists of lands, houses, buildings, or other structures standing on the natural banks of a river; but I think that it is equally true where erections are made on the margin of a river, or where a bridge is constructed across it, in accordance with the laws of the State and with the consent of Congress. Such structures are lawful and are private property, entitled to the constitutional protection. That which is lawful is not a nuisance, and cannot be prostrated or removed as such without compensation.

I should not have much difficulty in holding, if it were necessary to the decision of the case, that such structures, made in conformity with the laws of the State, if not prohibited by any act of Congress and not materially interfering with navigation, would be equally lawful and entitled to the protection of the Constitution. There is a vast amount of property of this sort in this country. The wharves which have been extended below low-water mark, the flats covered by shallow water which have been reclaimed, and the many bridges which have been erected over navigable streams are nearly all of this class. Navigation has rarely been materially interfered with in these works, the States themselves being deeply interested in preserving it free from obstruction. It would be strange if

Congress could destroy this species of property without any compensation whatever.

But the bridge in question had not only the sanction of the States of Kentucky and Ohio, which it was intended to connect, but it had also the sanction of an act of Congress. If that of the States was not sufficient to make it a lawful structure, that of Congress, in addition, certainly made it so. I cannot yield to the argument that the reservation in the joint resolution of 1869 made the bridge any the less lawful than it would have been if no such reservation had been made. After authorizing the bridge to be erected in the manner it was, the resolution went on to say: "That the said bridge, when completed in the manner specified in this resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States." Then comes the reservation referred to, as follows: "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." The power thus reserved was merely declaratory of the power which Congress would have had without reserving it; but there is no stipulation or condition that it might be exercised without providing for compensation to the proprietors of the bridge; and inasmuch as the bridge became a lawful structure—was, in fact, expressly declared such by the joint resolution of 1869—it cannot be presumed that this reserved power was to be exercised in any other than the constitutional mode. Hence, when the act of 1871 required the bridge to be taken down and constructed on a different plan, if constructed at all, we should expect what we find was done, that provision would be made in the same law for ascertaining the damages to which the appellants would be put by the alteration, and for the payment thereof out of the treasury of the United States. It is true that the law required the tribunal to which the matter was

referred to ascertain the liability of the United States, "if any there be," thus qualifying the provision for compensation by a preliminary inquiry as to the government's liability. This inquiry was probably directed to be made from the fact that doubts may have existed in the minds of some members of the legislative body whether the reservation referred to did not exonerate the United States from any obligation to make compensation. In my opinion it did not. I think, therefore, that the appellants were entitled to a decree in their favor, and that the decree of the Circuit Court dismissing the bill should be reversed.

FIELD, J. (dissenting.)—I am not able to agree with the majority of the court in their judgment in this case, nor in the reasons assigned for it. Their opinion proceeds upon a theory of the power of Congress over bridges crossing navigable waters to which I cannot assent. Its power to authorize the construction of such bridges not being conferred in express terms by the Constitution, must, if it exist, be deduced from the power to regulate commerce with foreign nations and among the several States. This power, it is true, is without limits, as we have often had occasion to observe. It authorizes Congress to prescribe rules by which commerce in its various forms may be conducted between our people and those of other countries, and between the people of different States, and also to adopt measures to facilitate and increase it. When the Constitution was adopted, commerce with foreign nations, and even between the several States, was carried on principally by means of vessels. Its regulation, therefore, required such control over our harbors, bays, and navigable streams connecting them, or different States, as might be necessary to keep navigation free from unnecessary obstructions, and might legitimately extend to making such improvements as would facilitate the passage of vessels, render their anchorage safe, and expedite the discharge of their cargoes and the landing of their passengers and crews. To this extent its power over navigable waters

goes under the commercial clause; no further. Unless, therefore, the free navigation of the public waters is impeded by what a State may do or permit, Congress cannot interfere with its action. And what is meant by their free navigation I shall hereafter explain. The doctrine of a paramount power in Congress over bridges crossing navigable streams—either to authorize their construction or regulate them, that is, control them when constructed—derives no support from its power to protect the free navigation of such streams. If a bridge, for example, built under the law of a State, should cross a navigable stream at so high a point and in such a way as in no manner to obstruct its free navigation, Congress could not interfere with the structure. Its permission would not authorize the building, nor its command authorize the removal of the bridge. And while Congress may declare that bridges of particular height and dimensions shall not be deemed an obstruction to the free navigation of the streams, it cannot interfere with bridges of a different size and character unless they prove to be an impediment to such navigation.

Of course, should Congress undertake the construction of a road for the postal service, or other national purposes, it might authorize the erection of a bridge over navigable streams to connect the road on opposite sides. But it is not of such works, or of bridges connecting them, that we are speaking; but of bridges built under the law of a State, and of the power which Congress has to interfere with and control them.

This view of the limits of the power of Congress will be more clearly apparent if we consider it in connection with the construction of docks, wharves, and piers. Some of our bays and harbors are miles in width. Such is the size of the bays of New York and of San Francisco; and some of the streams upon which piers and wharves are built, like the Mississippi and the Hudson, are over a mile in width. The several States own the soils under tide-waters within their limits. Speaking on this subject with reference to lands under the tide-waters of the bay of San Francisco, this court said: "Upon the ad-

mission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tide-waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." (Weber *v.* Harbor Commissioners, 18 Wall., 57.) The same doctrine was previously asserted in Pollard's Lessee *v.* Hagan, 3 How., 212; in Martin *v.* Waddell, 16 Peters, 367; in Mumford *v.* Wardwell, 6 Wall., 436; and subsequently in McCready *v.* Virginia, 94 U. S., 391. The State of California, exercising her right of disposition of such soils, granted in 1851 to the city of San Francisco a large tract of land covered by the tide-waters of the bay; and since then the tract has been filled up, and wharves, piers, streets, and blocks of buildings of the most permanent and costly character have been constructed upon it. The bay being miles in width, its free navigation is in no way impeded by the new blocks of buildings and streets where vessels once floated and cargoes were discharged.

Now, the control of Congress over the bay is as complete and unrestricted as over the navigable streams of the State. Could it, in the exercise of its commercial power, that is, in its control over navigation, direct the destruction of the wharves, the buildings, and streets which have been built where, in 1850, the tide-waters of the bay flowed? I doubt whether any jurist could be found who would hazard his reputation by giving an affirmative answer. And why not? Simply because until the free navigation of the bay for purposes of commerce is impeded, Congress has no power to interfere with the buildings and wharves constructed.

There are wharves and piers constructed, under State authority, at New York city where the waters of the Hudson

once flowed. There are wharves and piers in all our bays and harbors which are built in their waters. But as these structures do not interfere with the free navigation of the river in the one case, nor of the bays and harbors in the other cases, no judge or jurist has ever ventured to assert a power in Congress to order their removal at its pleasure; and simply because the right of interference on its part does not arise until the free navigation of the waters is obstructed. On what possible ground, then, can Congress order the removal of bridges built over navigable streams, under authority of the States, when they do not interfere with the free navigation of the streams? With the most careful consideration I can give to the subject I am unable to find any. To me it seems clear that no such arbitrary power exists.

The power of the State over its internal commerce must also be considered in treating of this subject. While the Constitution vests in Congress the power to regulate commerce among the several States, it leaves with each the regulation of its internal commerce. "Comprehensive," says Chief Justice Marshall, "as the word 'among' is, it may be very properly restricted to that commerce which concerns more States than one;" and "the completely internal commerce of a State, then, may be considered as reserved for the State itself." (Gibbons *v.* Ogden, 9 Wheaton, 195.) The jurisdiction of the State over the navigable waters within its limits, so far as may be necessary for the regulation of its internal commerce, is as complete as the jurisdiction of Congress over them for the regulation of interstate or foreign commerce. On this subject we said, in County of Mobile *v.* Kimball: "The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce, and insure its safety, they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws

of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States for the purposes and within the limits mentioned does not infringe upon the commercial power of Congress." (102 U. S., 699.)

It follows, I think, from what has been said, that the position of the majority of the court, as to the paramount power of Congress over bridges crossing navigable streams, is not tenable. Congress cannot invade the rights of a State, nor can a State impede the exercise of the just powers of the Federal government. The conclusion I draw is that a bridge constructed by the authority of a State, if it does not interfere with the free navigation of the stream, is a lawful structure, and can neither be taken nor destroyed by Congress or by the State, except as other private property may be thus taken, that is, for public purposes upon making just compensation.

It must also be borne in mind that the power to regulate commerce with foreign nations and among the several States extends to such commerce on land as well as to that on navigable waters. There are highways on land in every State on which a far greater commerce, both interstate and foreign, is conducted than that which is borne upon its navigable waters. Congress can require that this commerce shall be as free from unnecessary obstruction as that on navigable waters connecting two or more States or leading to the sea. There is nothing in the Constitution which in any respect distinguishes the regulation it may exercise in either case. Its power, in all its extent and with all its limitations, is the same in both. The fact that navigable waters are natural highways, and roads, railways, and canals are of artificial construction, does not affect the power. That is one of regulation of interstate and foreign commerce by whatever channels conducted. If bridges crossing natural highways cannot be constructed without the consent of Congress, because it is vested with the power to regulate commerce with foreign nations and among the States, for like reason bridges cannot be constructed without such

consent over artificial highways on land. The argument for the necessity of the consent in the one case is equally good in the other, and is equally unsound in both. In nearly every county of every State bridges have been constructed under State authority over railways—the great highways of commerce in modern times—and it has never been suggested that the consent of Congress to their construction was at all necessary.

Nor do I find in the previous decisions of this court any recognition of a power in Congress to authorize the construction of bridges over navigable streams within or bordering on the States,—in the sense that its permission will justify their construction, and that without it such construction would be unlawful; excepting, of course, bridges which are parts of works undertaken for national purposes,—or of a power to regulate them, that is, to control them, after they are constructed. There are expressions in the opinions of the judges in the Wheeling Bridge case, in the 18th of Howard, that, under the power to regulate commerce, Congress may declare what shall and shall not be deemed in judgment of law an obstruction to navigation. But these expressions, in their generality, were not called for by the case before the court. That only called for a determination of the question whether a structure adjudged by the court to be unlawful as an obstruction to the navigation of the river could afterwards be legalized by Congress. The court held that it could be legalized, which amounted to no more than declaring that it should not thereafter be treated as interfering with the public right of navigation of the river, so far as that right was under the protection of Congress. This is a very different thing from asserting a power to declare that a structure lawful when erected, and in no way interfering with the navigation of the river, is an unlawful structure, removable without compensation to the owner. I cannot admit that there is any such arbitrary power under our government. I find no warrant for it in the Constitution; on the contrary, all the guarantees which that in-

strument contains for the security of property negative its existence. Yet out of this assertion of a power to legalize a structure which, without such sanction, would be deemed an obstruction to navigation, has grown up the doctrine of an independent power in Congress to authorize the construction of bridges over navigable streams without the permission of the States, and to control them when constructed. In this we are furnished with a striking illustration of the facility with which power is assumed from expressions, loosely or inadvertently used, apparently recognizing its existence. From the use of the word "assent" to the erection of a bridge over a navigable river, or the declaring of one already erected a lawful structure, the transition has been easy and natural to the assumption of an affirmative power in Congress to authorize, independently of the action of the States, the construction of such bridges, and to control them. From the authorities cited and the reasons assigned it is evident that Congress possesses no such power. In the Wheeling Bridge case, in the 18th of Howard, Mr. Justice Nelson, who delivered the prevailing opinion, said: "The bridge had been constructed under an act of the Legislature of the State of Virginia, and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce." (18 How., 430.) Mr. Justice McLean, while dissenting from the asserted power of Congress to declare a bridge to be a lawful structure which had been adjudged by the court to be a public nuisance as an obstruction to navigation, spoke with emphasis against the existence of any authority in Congress to construct bridges, and, of course, to authorize their construction, and his views do not appear to have met with any dissent from the other judges. "If," said he, "under the commercial power, Congress may make bridges over navigable waters, it would be difficult to find any limitation of such a power. Turnpike roads, railroads, and canals might on the same principle be built by Congress. And if this be a constitutional power, it cannot be restricted or interfered

with by any State regulation. So extravagant and absorbing a Federal power as this has rarely, if ever, been claimed by any one. It would, in a great degree, supersede the State governments by the tremendous authority and patronage it would exercise. But if the power be found in the Constitution, no principle is perceived by which it can be practically restricted. This dilemma leads us to the conclusion that it is not a constitutional power."

Such, also, has been the uniform doctrine of the Supreme Courts of several States, declared by judges some of whom were justly distinguished by their learning and ability. Thus, in the People *v.* The Rensselaer and Saratoga Railroad Company, in the Supreme Court of New York, Chief Justice Savage, in delivering its opinion, said: "I think I may safely say that a power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. Such power certainly did exist in the State Legislatures before the delegation of power to the Federal government by the Federal Constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains, then, in the State Legislatures, or it exists nowhere. It does exist, because it has not been surrendered any farther than such surrender may be qualifiedly implied; that is, the power to erect bridges over navigable streams must be considered so far surrendered as may be necessary for a free navigation upon those streams." (15 Wend., 131.)

If weight is to be given to these authorities and to the reasons on which they rest, it must follow that the sovereignty and jurisdiction of the States over their navigable waters, which were as absolute upon the adoption of the Constitution as over their roads, still continue; except that they are to be so exercised as not to obstruct the free navigation of the waters —so far as such navigation may be required in the prosecu-

tion of interstate and foreign commerce. And by "free navigation" is not meant a navigation entirely clear of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is free when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian States. In this country the navigation of a river is deemed to be free when it is kept open for vessels cleared of such physical obstructions as would retard their passage beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws, and such occasional tolls as may be levied to meet the expenses of improving its navigation. The delays attendant upon the necessary transit of persons and property, or the enforcement of quarantine and health laws, or the exaction in exceptional cases of tolls, are not deemed to be inconsistent with the free navigation of the river in the legal sense of those terms. Thus, bridges with draws of sufficient width for the passage of vessels are allowed on rivers in Europe, like the Rhine, whose navigation is declared to be free. So in this country such bridges do not destroy the free character of the navigation any more than ferries, though, like them, they may cause more or less delay to vessels. In Palmer *v.* Commissioners of Cuyahoga County, application was made to the Circuit Court of the United States sitting in Ohio for an injunction to prevent the construction of a draw-bridge over the Cuyahoga River, on the ground that it would obstruct the navigation of the river and injure the property of the plaintiff in its vicinity. It was founded upon the fourth article of the ordinance of 1787 respecting the Northwestern Territory, which declares "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said Territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." The court, refusing the injunction,

said that this provision "does not prevent a State from improving the navigableness of these waters by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." And again: "A draw-bridge across a navigable water is not an obstruction. As this could not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the State to make the bridge."

In the Wheeling Bridge case, the bridge was held to be an unlawful obstruction because it entirely prevented the passage of steam vessels with high chimneys, and the court ordered that it should be elevated in a manner and to an extent indicated, so as to afford a free passage for the steamers; or that some other plan should be adopted by a day designated which would relieve the navigation from obstruction. Upon a suggestion that the obstruction to the navigation might be avoided by making a draw in the bridge, or in some other manner equally convenient to the public and less expensive than by elevating it, the matter was referred to an engineer; and upon his report the company was allowed to make an attempt to obviate the obstruction by improving another channel of the river and constructing a draw in the bridge over it. Some slight delay would be caused by the draw, and an increased distance would have to be run in passing the new channel; but the court did not consider these circumstances as constituting a material objection to the plan. (See also

Cooley on Const. Limitations, pp. 591–4, and authorities there cited.)

The considerations to which I have referred and the authorities cited lead to a ready solution of the questions raised by the case at bar.

The construction of a bridge over the Ohio River was authorized by the legislation of Kentucky and Ohio. The legislation of Kentucky, adopted in 1868, provided that the bridge "should be so constructed as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize." The legislation of Ohio, adopted the same year, authorized the construction of a bridge "either with a single span or with a draw," as the company—incorporated for that purpose—might determine; but in either case, in order that said bridge might not obstruct the navigation of said river, the same should be built in accordance with the act of Congress of July 14, 1862, or of an act that Congress might thereafter pass on the subject; which, of course, meant before the bridge was built. The only regulation of Congress to which the erection of the bridge was made subject by the States was such as had been prescribed or might be prescribed previously to the execution of the work. The bridge was not surrendered to any further disposition or control of the general government. The companies organized under the laws of the two States for the construction of the bridge were authorized to consolidate themselves into one company. They were consolidated under the name of the Newport and Cincinnati Bridge Company.

On the 3d of March, 1869, Congress passed a joint resolution giving its consent to this company to erect a bridge over the Ohio River from Cincinnati to Newport, provided it be built with an unbroken or continuous span of not less than four hundred feet in the clear from pier to pier, over the main channel of the river, and in all other respects in accordance with the conditions and limitations of an act entitled "An act to establish certain post-roads," approved July 14, 1862; and the resolution declared that the bridge, when completed

in the manner specified, should "be deemed and taken to be a legal structure," and should be "a post-road for the transmission of the mails of the United States." It also had this clause: "*But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge.*"

The act of July 14, 1862, provided that any bridge erected under it might, at the option of the company building the same, be constructed either as a draw-bridge with a pivot, or other form of draw, or with unbroken or continuous spans; and specified the width of the spans and the elevation of the bridge.

In March, 1869, the company commenced the construction of a bridge across the river according to a plan which met all the conditions imposed by the legislation of the States and of Congress, and the work was prosecuted until March, 1871, when it was nearly completed, the actual cost then incurred being about eight hundred and seven thousand dollars. The whole cost when completed, at contract prices, would have been about eleven hundred and ten thousand dollars. On the 3d of March of that year, while the company was in the prosecution of the work, Congress passed an act declaring that it would be unlawful for the company, or any other person, to proceed with the erection of the bridge without making various alterations, including a wider span and a higher elevation, which should be submitted to the Secretary of War for his approval.

The company immediately suspended work, adopted a new plan, submitted it to the Secretary of War, obtained his approval, and then proceeded with the bridge and completed it. The additional work and the necessary changes in that already done, required by the act of Congress, caused an additional expenditure of over $300,000. The act also provided that in the event the company made the changes it should be lawful

for it to file a bill in equity against the United States in the Circuit Court for the Southern District of Ohio, which should have jurisdiction to determine, first, whether the bridge, according to the plans on which it had progressed at the passage of the act, had been constructed so as substantially to comply with the provisions of law relating thereto; and second, the liability of the United States, if any there were, to the company, by reason of the changes required; and if the court should determine that the United States were so liable, and that the bridge was so being built, then the court should further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the bridge and its approaches, in excess of the cost of building the bridge and approaches according to the original plan. The court was further authorized and required to proceed therein to final decree as in other cases of equity.

Under this act the present bill was filed, and it was clearly shown at the hearing that when the act was passed the bridge had been constructed substantially in compliance with all the provisions of law in relation thereto; that so far as constructed it did not materially obstruct the navigation of the river, and would not have done so had it been completed according to the original plan. Yet the court below held, and this court sustains its ruling, that for the enormous expenditures forced upon the company the United States are in no way responsible. This court thus, in effect, decides that the power of Congress over all structures crossing navigable streams is absolute, and that it can change or remove them at its pleasure, without regard to their effect upon the free navigation of the streams, and without compensation to the owners.

I do not think that the assent of Congress to the erection of the bridge was at all essential to its character as a lawful structure. That depended upon the legislation of Kentucky and Ohio, and upon the contingency of the bridge not interfering with the free navigation of the river. The assent of Congress,

as already stated, only removed all ground of complaint of the structure as interfering with the public right of navigation, so far as that right was under the protection of the Federal government. No one could afterwards complain that the bridge, if built in conformity with the directions specified, constituted a public nuisance, because interrupting the free navigation of the river as secured under the laws of Congress, and proceed to obtain its abatement. The authority of the States to build it, coupled with the assent of Congress, if constructed in the manner prescribed, placed the work, whilst in the process of erection and when completed, beyond the reach of legal proceedings for its abatement or modification. It could not, when completed, be taken for public purposes by the general government, nor be materially changed in its form and structure whilst in the process of erection, under compulsion of the legislation of Congress, without compensation to its owners. The legislative declaration, made when it was nearly completed, that its further construction would be unlawful without a change of plan which necessitated very costly alterations, or an abandonment of the bridge, was a taking from its owners of a portion of their work as effectually as its absolute appropriation. If not, in the strict constitutional sense, a taking of private property for public uses, it was an enforced expenditure of labor and materials by the company not required by the work undertaken, or the conditions on which assent to its construction had been given; and for such labor and materials the government should, on every principle of justice, indemnify the company. A legislative decree commanding such an expenditure is within the spirit, if not the letter, of the constitutional provisions which inhibit depriving one of his property without due process of law, and taking it from him without compensation. The wrong inflicted is as great in the one way as in the other. As the provisions were designed to secure the individual from the arbitrary spoliation of his property, their purpose could be readily evaded if a special act could exact, for the protection of his property, an expenditure of

money or labor which was neither exacted when the property was acquired, nor permitted by the terms of its acquisition.

This view was taken by the Court of Appeals of Virginia in Crenshaw *v.* Slate River Company, reported in 6th Randolph. There it was held that after a mill had been established and a dam erected according to a law granting to the mill-owner the use of the water for grinding, a subsequent act of the Legislature which imposed on him the burden of erecting locks through his dam, keeping them in repair, and giving them attendance so as to admit the passage of boats, and on his failure vested in a company the power to abate the dam as a nuisance, without full indemnification and equivalent for the injury thus done to his vested rights, was contrary to the Constitution of the State, and void as a taking of private property for a public use without compensation.

There are many ways of taking property other than by occupation or appropriation which are within the constitutional inhibition. If its beneficial use and enjoyment are prevented under the sanction of law, it is taken from him as effectually as though the title were condemned. Such is the purport of the decision in Pumpelly *v.* Green Bay Company, 13 Wall., 166, a decision which has attracted much attention from its enlarged views of the redress afforded by the constitutional provision for injuries to property, effected under authority of law, which permanently and materially impair its value. It was there held that the backing of the water of a river in Wisconsin by a dam authorized by law so as to overflow the land of an individual, thus destroying its usefulness to him, was a taking of the property within the meaning of the Constitution. Mr. Justice Miller, in delivering the opinion of the court, very justly observed that "it would be a very curious and unsatisfactory result if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just prin-

ciples of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

It is not necessary, however, in order to charge the government with the expenditures forced upon the company, to rely upon this provision of the Constitution further than to show the general spirit which should control the government in its legislation affecting the property of individuals. There is a general principle of justice pervading our laws, and the laws of all free governments, which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure of money or labor or materials for the protection and preservation of his property, shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the government as to those of individuals; and wherever suits can be brought in the tribunals of the country, such indemnity can be enforced. Here the government waives exemption from suit which its sovereign character gives, and submits the question of its liability to the judgment of its tribunals, thus admitting a readiness to indemnify the owners of the bridge if it has disregarded its pledge and dealt unfairly with them in the premises.

The resolution of Congress giving its consent to the erection of the bridge specified its character and form, and the right to withdraw the consent or to direct necessary modifi-

cations and alterations of the bridge was reserved, to be exercised only in case the free navigation of the river should at any time be substantially and materially obstructed by the bridge. The reservation clause is to be read as though written thus: "But Congress reserves the right to withdraw the assent hereby given [or to direct the necessary modifications and alterations of said bridge] in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution." The right to withdraw the assent or to direct alterations was thus made to depend upon the same contingency, and the resolution amounts to a pledge of the government that neither should be done unless the contingency happened. Congress said to the constructing company in substance thus: "You are empowered by the States of Kentucky and Ohio to build a bridge over the Ohio River, of certain height and dimensions, provided it be so constructed as not to obstruct the navigation of the river further than the present laws of the United States authorize, and in accordance with the act of July 14, 1862. Now, we consent to the erection of the bridge, that is, we declare that, if constructed in the manner prescribed, it shall not be deemed an obstruction to the free navigation of the river; but we reserve the right to withdraw this assent, or to direct alterations to the bridge, if hereafter the free navigation of the river should be substantially and materially obstructed by it."

The general government, through Congress, thus bound itself not to interfere with the construction of the bridge, nor with the bridge when completed, except on the contingency of its proving a material obstruction to the free navigation of the river. Such contingency had not occurred when the act directing the alterations was passed. It has never occurred. So the proofs in the case show; and, independently of this circumstance, whether or not the contingency had occurred was not a fact to be arbitrarily determined by the Legislature. It was to be ascertained judicially upon proofs and after hearing the

parties, like any other disputed fact upon the establishment of which rights of property depend. This doctrine, as well as other positions advanced in this opinion, is well illustrated by the case of The Commonwealth *v.* The Proprietors of New Bedford Bridge, 2 Gray, 339. There the act chartering the corporation authorized the building over a navigable stream in Massachusetts of a toll-bridge with two suitable draws, which were to be at least thirty feet wide—one on the west side of the river in the channel way, and the other on the east side in the most suitable place there. A bridge with such draws was accordingly built. A subsequent act of the Legislature required the corporation to make and maintain, in lieu of one of these two draws, a new draw of not less than sixty feet in width, the westerly abutment of which was to be eight feet further to the eastward than the westerly abutment of the existing draw. The bridge proprietors not making the changes required, were indicted for obstructing the navigation of the river by their bridge. They justified under their act of incorporation. In deciding upon their liability the court held that the original act of incorporation, when accepted, constituted a contract between them and the State, by the terms of which both parties were equally bound; that the proprietors could not, without the consent of the Legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the act; nor could the Legislature, without the assent of the proprietors, in any way affect or impair the original terms of the charter by annexing new conditions or imposing additional duties onerous in their nature, or inconsistent with a reasonable construction of the contract; that by its terms the proprietors were to erect "suitable draws, which were to be not less than thirty feet wide," and that the question whether the draws already made were suitable—that is, constructed so as not unreasonably or unnecessarily to obstruct or impede the navigation of the river—was not a question to be determined absolutely by the Legislature or by the proprietors, when disputed between the parties. "Like all other

matters involving a controversy concerning public duty and private rights," said the court, "it is to be adjudged and settled in the regular tribunals where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice." The same doctrine is also well illustrated in the case of The Mayor of Baltimore *v.* The Connellsville and Pittsburg Railroad Company, decided in the Circuit Court of the United States by the late Mr. Justice Grier. The charter of the Pittsburg and Connellsville Railroad Company, a corporation of Pennsylvania, contained the following provision, viz.: "If the said company shall at any time misuse or abuse any of the privileges herein granted, the Legislature may resume all and singular the rights and privileges hereby granted to such corporation." Under this clause the Legislature passed an act, in 1864, revoking and resuming all the rights and privileges granted to the company, so far as it authorized the construction of a line southwardly or eastwardly from Connellsville. But the court held that when the right to revoke was to be exercised only in case the corporation should misuse or abuse its privileges, the fact of such misuse, if denied by the corporation, should be established by competent proceedings; and that an act declaring a revocation without the establishment of such fact was unconstitutional. In giving its opinion Mr. Justice Grier said: "If in the act of incorporation the Legislature retains the absolute and unconditional power of revocation for any or no reason; if it be so written in the bond, the party accepting a franchise on such conditions cannot complain if it be arbitrarily revoked; or if this contract be that the Legislature may repeal the act whenever in its opinion the corporation has misused or abused its privileges, then the contract constitutes the Legislature the arbiter and judge of the existence of that fact. But the case before us comes within another category. The contract does not give an unconditional right to the Legislature to repudiate its contract, nor is the Legislature constituted the tribunal to adjudge the

question of fact as to the misuse or abuse." (4 Amer. Law Reg., N. S., 750.)

A consciousness seems to have pervaded Congress that it was disregarding its pledge to the company when it directed the alterations, which proved so expensive, before the contingency mentioned had happened, and that it might turn out that the bridge completed as designed would not substantially and materially obstruct the free navigation of the river; and that, in that case, it would be justly chargeable with the commission of an injury to the company. For this reason, I think we may assume it intended that the court should award compensation to the owners for the alterations made, if, upon proof, it appeared that, so far as the bridge had been constructed, when they were required, the provisions of the law relating thereto had been substantially complied with, and it should also appear that if completed as originally designed the bridge would not have substantially and materially obstructed the free navigation of the river. Congress did not intend that heavy expenditures should be imposed by its will upon the company without at the same time offering, if they were illegally exacted, to reimburse them. Congress intended to be just, and I cannot resist the conclusion that the court in its decision has defeated its intentions.

MILLER, J. (dissenting.)—I dissent from the decree of the court in this case, and as I cannot agree to all the grounds on which my brother Field dissents, I will state very briefly the reasons which have seemed to me to require the reversal of the decree of the Circuit Court.

Congress gave its assent in the most solemn form, by the joint resolution of 1869, to the erection of a bridge over the Ohio River by the appellant company, the character of which was described in the resolution. It reserved the right to withdraw the assent thus given in case the free navigation of the river should at any time be substantially and materially obstructed by any bridge to be erected under the authority of

this resolution, or to direct necessary modifications and alterations of said bridge. The Circuit Court finds that up to 3d day of March, 1871, the bridge company had proceeded in the erection of their bridge, "in all respects constructing the same so as substantially to comply with the provisions of the law relating thereto."

On that day Congress passed the act under which this suit is brought; and it is upon the construction of this act, in connection with the joint resolution of 1869, that the decision of this case must turn.

It will be observed that the joint resolution reserved to Congress a right to interfere and assert its power only in case the bridge of the appellants should at any time *substantially and materially* obstruct the free navigation of the river; and in that event the reservation was that Congress might withdraw the assent so given to the erection of the bridge, *or* direct the necessary modifications and alterations of said bridge. It is not necessary to inquire whether Congress could do both these things or not; for it did not, as I understand the language of the act of March 3, 1871, withdraw or intend to withdraw its assent previously given.

It did exercise the alternative power given by the joint resolution, and "direct the necessary modifications and alterations of said bridge."

The legislation by which this is done is the fifth and last section of an act making appropriations for the service of the Post-office Department.

It is important to observe that it contains no declaration that the bridge, as it had been and was being constructed, would either partially or substantially obstruct the navigation of the Ohio River, nor does this court base its decree on the existence of that fact; nor do counsel in the argument before us insist that this was proved, or that it was a necessary condition to the exercise of the power which Congress assumed in passing the statute requiring alterations in construction of of the bridge costing over $200,000.

Why did not Congress declare as a reason for the exercise of this power that the bridge as originally authorized by it was or would be an obstruction to navigation? and why did it not content itself with making that declaration and withdrawing its assent, as it would then have a right to do?

The best answer to this question, the most reasonable one to be made, and the one most consistent with the evidence in this record, is that either the fact did not exist, or was not so apparent to Congress that it was willing to found any action on it.

But Congress, with this view of that question, and entertaining also a just view of its powers and obligations as regards the appellants and their bridge, determined to exercise such power as it had for the purpose of changing the structure from a draw-bridge to a bridge so high above the water that no draw was necessary.

It did this; but, in the same section which prescribed this change and forbid the company to proceed in any other mode of construction, it provided equitable relief for the injury which this somewhat arbitrary act of power inflicted on the bridge company.

I repeat that it was competent for Congress to have declared that the bridge, as it was in process of construction, had proved to be a substantial and material obstruction to the free navigation of the river, and for that reason the assent of Congress to its erection was withdrawn; or that it would be such obstruction unless certain modifications of the plan were made, which Congress could prescribe, and require them to be made. But it did neither. It based no action on the assumption that the bridge was or would be an obstruction to navigation, but it determined to change the bridge from a low bridge with a draw to a high bridge without a draw. The difference in these two are well known to every one who has travelled over our western rivers, and I myself am familiar with no less than ten draw-bridges across the Mississippi River, built under acts of

Congress, which are not substantial or material obstructions to the navigation of that great river.

Congress, therefore, never intended to act on the reservation contained in the joint resolution. No reference is made to that resolution in the act of 1871 requiring this total change of plan.

Nothing is more reasonable, therefore, than that Congress—resorting to its high prerogative of requiring a structure which would not only be no *substantial* or *material* obstruction to navigation, (words well understood,) but one which would impose no delay in passing it, nor interfere in the slightest possible manner with navigation—should see that equity and justice required compensation for the loss inflicted by this change.

It *did* see this and provided for the situation. Until the structure was completed no one could tell the cost of the changes required. When completed, the safest tribunal, as Congress thought, to determine this was a court. And that the court might not be restricted by the rigid rules of a court of law, it referred the matter to a court of equity, with instructions to proceed as in other cases in equity. It required the court to determine "the actual and necessary costs and expenditures reasonably required to be incurred in making the changes ordered," and it instructed the Secretary of the Treasury to pay the amount so found.

It required the court to ascertain, "first, whether the bridge, according to the plans on which it has progressed at the passage of this act, has been constructed so as to substantially comply with provisions of law relating thereto." The court found that the bridge was in conformity to law, including, of course, the joint resolution giving the assent of Congress. "Second, the liability, if any there be, of the United States to said company by reason of the changes by this act required."

The whole argument of the opinion of the court is founded on the potentiality of this "*if any there be.*" And the whole

scheme and purpose of the joint resolution; its assent with qualified power of withdrawal; the failure of Congress to declare the existence of the condition on which this right of withdrawal was to be exercised; the fact that the law required the court to find whether the appellants had proceeded according to law, and that the court found they had so proceeded; the great loss which appellants were compelled to bear, and the reference of the whole matter to a *court of equity*, are all ignored, that we may throw ourselves back on the general and absolute power of Congress over navigable waters to defeat this eminently just claim for losses growing out of the exercise of that power. It is impossible for me to believe that Congress went through all this tedious legal machinery to have the court decide upon its *right* to exercise such a power without responsibility. It is not the habit of that body to refer intentionally the question of its constitutional power to the courts of the country.

Nor is such construction of the words "if any there be" necessary. There were two contingencies in which Congress might have acted as it did without incurring any just obligation to make compensation. One of these was that the bridge might not have been built in conformity to the terms of the joint resolution, and in that event the company was in no condition to complain of the action of Congress requiring a change. The act required this fact to be ascertained by the court, and it evidently meant that no damages should be awarded unless it was found that the law was complied with.

Congress might, also, while declining to ascertain for itself whether the bridge as authorized was likely to prove *a substantial and material* obstruction to navigation, have made compensation for the change they ordered to depend upon the existence or non-existence of that fact, and left it to the court to determine.

This court refuses to inquire into this latter question, and notwithstanding the fact, which the court was expressly required to find, is found in favor of appellants, proceeding on

Statement of the case.

what I think is a fallacious view of the statute, namely, that Congress intended to refer to the court the question of its constitutional power to change the character of the bridge, it decides in favor of that power, and disregards the whole structure of the two acts on which the right to compensation is based.

I think Congress intended to waive that question, and in favor of justice and fair dealing to pay for the losses incurred under the very act which gave the compensation, if it was found that the bridge, as far as it had progressed, was in conformity to law, and would not be a substantial and material obstruction to navigation if completed on that plan.

AFFIRMED.

JOSEPH H. OGLESBY AND JULES CASSARD v. HENRY Y. ATTRILL.

May 8, 1882.

1. Courts will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is legal.
2. A compromise of a pending suit, under Louisiana law, has, between the interested parties, the force of a thing adjudged, and cannot be attacked collaterally.

ERROR to the Circuit Court of the United States for the District of Louisiana.

The petition of the plaintiff alleges that he had become the sole owner of all the capital stock of the Crescent City Gas-Light Company, a corporation created by an act of the Legislature of Louisiana approved April 20, 1870; that the stock was divided into 30,000 shares of $100 each; that in March, 1875, he entered into negotiations with the New Orleans Gas Company, another corporation created under the laws of that State, for an amalgamation of the two companies, pursuant to an act of the Legislature of the previous year; that the negotiations resulted in an agreement for amalgamation between the two companies through their responsible boards of direct-

ors; that the agreement was ratified by the requisite number of stockholders on the 9th of April following; that on the ensuing day the agreement was deposited with the secretary of State, as required by law; that under the agreement the consolidated company retained the name of the New Orleans Gas-Light Company, and its full-paid stock was divided into 37,500 shares of $100 each—of which 12,500 shares were allotted to the plaintiff as owner of all the stock of the Crescent City Gas-Light Company, and the residue, 25,000 shares, were allotted to the owners of the stock of the original New Orleans Gas-Light Company.

The petition further alleges that on the 10th of April, 1875, about the time of the consummation of the agreement of consolidation, the defendants, Oglesby and Cassard, the former representing himself as entitled to 3,550 shares and the latter to 1,150 shares of the stock of the Crescent City Gas-Light Company, united with one Hernandez in a letter addressed to the president of the New Orleans Gas-Light Company, which was as follows:

"NEW ORLEANS, *April* 10, 1875.

"JAMES JACKSON, *President Gas Company:*

"By the newspapers we noticed that you are about to make an adjustment of your contest with the Crescent City Gas Company. We, the undersigned, hereby notify you that at the commencement of the litigation with your company we were the owners of the shares in the Crescent City Gas Company attached to our undersigned names; that we were defrauded of said stock by the fraud and machinations of the officers of said company, and that we intend to prosecute our claim to the same; and hereby notify you that any compromise or adjustment you may make with the said Crescent City Gas Company will be subject to our rights to the extent above stated, and that legal proceedings will be instituted to enforce our said rights.

"J. H. OGLESBY, 3,550 shares.
"JULES CASSARD, 1,150 do.
"J. HERNANDEZ, 400 do."

Statement of the case.

The petition avers that this letter was written with the malicious intent to embarrass the plaintiff in the exercise of his rights under the agreement to consolidate; that the claim made was groundless; that on the 7th of April, 1873, the directors of the Crescent City Gas-Light Company had levied an assessment on the stock of the company of one and one-half per cent., and under it the defendant Oglesby was bound to pay $6,075 as owner of 4,050 shares, and the defendant Cassard was bound to pay $1,725 as owner of 1,150 shares; that they refused to pay this assessment, and on the 6th of May, 1873, instituted suit, in conjunction with other shareholders, to enjoin the directors from proceeding to enforce its payment, and set up as grounds therefor "frauds and machinations of the officers of the said company"; that on the 14th of that month the company brought suit against Oglesby and Cassard to enforce payment of the assessment, and that on the following day, May 15, Cassard transferred his shares to one Phipps, and on the 22d of the month Oglesby transferred to him 3,550 shares of his stock and disposed of the residue to other parties; that these transfers were made in settlement and compromise of the rights of the respective parties, in pursuance of which an indorsement was made on them to the effect that the company assented thereto, although only fifty cents per share had been paid, and released Oglesby and Cassard from all past, present, and future assessments thereon; and that, thereupon, the respective suits were dismissed, those by the company against Cassard and Oglesby, and the one by them against the company.

The petition further avers that the notification above mentioned has operated to impair the absolute control of the plaintiff of a large amount of stock in the consolidated company, and that the claim set up by the defendants throws a cloud over the title of a large portion of the shares allotted to him, and, from the nature of the claim, causes a confusion which impairs and depreciates the value of the entire number of his shares to his damage of $200,000. He therefore prays that

the defendants may be severally cited, and after due proceedings be condemned *in solido* to pay to him that sum, with interest and costs.

The petition was filed in the Fourth District Court of the parish of Orleans, of Louisiana, but on application of the defendants was removed to the Circuit Court of the United States. They then filed an answer and a petition in reconvention, making what is termed a reconventional demand, or counter-claim. The substance of this petition is that the assessment levied upon the stock of the Crescent City Gas-Light Company was unnecessary; that the directors of the company had made no arrangement to purchase property or to build gas-works, or to lay pipes for gas, and had no serious design of doing so; that the charter of the New Orleans Gas-Light Company of 1835 contained a provision authorizing a sale of its gas-works to the city of New Orleans; and that the defendants and other corporators of the Crescent City Gas-Light Company "had in contemplation an arrangement so beneficial to the city of New Orleans that they had no doubt they would be able to buy from it the pipes, gas-works, and other property" which it might thus acquire, and that it was the design and object of the corporators to wait "until time should develop whether they could purchase from the city of New Orleans or should be compelled to build for themselves"; that the directors were put into office through the influence of the plaintiff, and were completely under his control; that the assessment levied was instigated by him to induce the stockholders to part with their stock, and to enable him to purchase it for a mere nominal sum; that the plaintiff and the directors confederated together to make the assessment to carry out this scheme, although they agreed among themselves that no assessment of their stock should be made; and that they used the process of the courts to compel the defendants to submit to their arbitrary and unnecessary exactions.

The defendants admit that suits were brought against them to enforce the payment of the assessment levied on the shares

held by them, and that they made the compromise stated in the petition; but allege that inasmuch as the assessment levied, and others threatened, involved the payment of enormous sums, and inasmuch as they had reason to believe that neither of them would derive any benefit therefrom, they were compelled to make the compromise to prevent their ruin; and that the agreement to surrender their stock in consideration of being released from liability for the assessment, and the dismissal of the suits against them, were made in ignorance of the fact that Phipps, to whom they transferred their stock, was an agent of the plaintiff to combine with the other directors to compel the stockholders to sacrifice their stock; and that they did not know at the time, nor until within six months past, of the conspiracy between the plaintiff and the other directors as above charged, and but for "said error of fact" they would have defended the suits brought against them, and would not have surrendered their stock; and that they have ascertained within six months that the plaintiff and other capitalists at the North had furnished Phipps and others with the means to buy up the stock so soon as it could be forced on the market by the proceedings of the directors.

The defendants then allege that each share of the Crescent City Gas-Light Company is worth not less than one hundred dollars; that they are severally entitled to the stock which they respectively owned as mentioned; that they were illegally and cunningly deprived of it by the plaintiff, who has converted it to his own use, and that he is accountable to each of them for its value, namely, to the defendant Oglesby for $355,000, and to the defendant Cassard for $115,000; and to pay said amounts they pray that he may be condemned.

To this reconventional demand the plaintiff excepted on the ground that it was prescribed by one year, and also on the ground that it disclosed no cause of action against the plaintiff. The court overruled the exceptions, and the case was tried by a jury, who found against the claim of the plaintiff and that the reconventional demand should be dismissed. The case

comes here on a writ of error taken by the defendants. The plaintiff abides by the judgment entered on the verdict.

Henry B. Kelley, *Richard De Gray*, *C. B. Singleton*, and *R. H. Browne*, for plaintiffs in error.

Thomas J. Semmes and *S. T. Wallis*, for defendant in error.

FIELD, J.—We do not deem it necessary to consider the rulings of the court upon the admission of evidence, nor the instructions given to the jury, nor those refused. The affirmance of the judgment may be rested on the compromise made between the defendants (the petitioners in reconvention) and the company, assuming that in its absence the petition in reconvention discloses a cause of action against the plaintiff below. They allege that a fraud was practiced on them by the directors of the company at his instigation; that he joined in a conspiracy to get possession of their stock at a nominal price, and that in order to carry out this scheme an assessment was levied which was unnecessary for any immediate purpose of the company, and that others were threatened. But they do not allege that the assessment was in excess of the powers of the directors, nor that it would have been unnecessary if the company had intended at the time to purchase or build gas-works required for its business, or to raise money for other corporate purposes; but that under the circumstances then existing it would have been good policy to wait for future proceedings on the part of the city of New Orleans. As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful. (Bailey *v.* Birkenhead, Lancashire and Cheshire Junction Railway Co., 12 Beavan, 439.)

Opinion of the court.

The supposed fraudulent intentions of the officers in levying the assessment which are now alleged as grounds for treating it as invalid were urged by the defendants as reasons for enjoining its enforcement in the suit they instituted; and any claims arising from that cause were covered by the compromise admitted in the pleadings. A compromise, by the code of Louisiana, is defined to be "an agreement between two or more persons who, for promoting or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing," (art. 3071,) and has, between the interested parties, a force equal to the authority of a thing adjudged. It cannot be attacked on account of any error in law, or any lesion. (Art. 3075.)

The suits between the defendants and the Crescent City Company involved the validity of the assessment which they, on account "of frauds and machinations of the officers," sought to enjoin, whilst the company sought to enforce its payment. The compromise concluded embraced the dismissal of the several suits—of those brought against the defendants and the one brought by them against the company—the transfer of their stock, and their release from present and future assessments thereon. There is no averment that it was induced by any false representations of the plaintiff or of the directors, or that the assessment was not a genuine one, or that the agreement of the directors that no assessment should be levied on their stock was carried into effect, or that there was any concealment of the affairs of the company; and of the value of the stock the defendants were as competent to judge as any others in the market. Their ignorance that its purchase by Phipps was made for the plaintiff does not in any respect affect the character of the transaction. It was of no moment to them who became the purchaser, nor did they so regard it, for the transfers of their stock were made in blank. The compromise stands, therefore, as a judgment, making a settlement of the very matters

now set up as grounds of complaint in the petition in reconvention, that is, "the frauds and machinations of the officers of the company" in levying the assessment. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly between the company and the defendants, it protects from further suit those who advised equally with those who levied the assessment; participants in whatever wrong was committed, if any there were, as well as principals; abettors as well as doers of it. No allegations of fraud, in addition to those made at the settlement, can prevent the compromise from having effect as a judgment thereon. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. (Adle *v.* Prudhomme, 16 La. Ann., 343.) In the face of the compromise the reconventional demand cannot be sustained.

Judgment affirmed. AFFIRMED.

THE CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, JAMES W. ELWELL, AND R. BIDDLE ROBERTS v. WILLIAM R. FOSDICK, JAMES D. FISH, FREDERICK W. HUIDEKOPER, THOMAS W. SHANNON, AND JOHN M. DENNISON.

May 8, 1882.

It being alleged that the record on which the case at bar was decided was not complete, a rehearing was granted in order to enable the parties to bring up a complete record.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Petition for rehearing.

Lawrence, Campbell & Lawrence and *Henry Cranford*, for the petitioners.

Opinion of the court.

MATTHEWS, J.—Since the announcement of our former opinion the appellees, having filed a petition for rehearing, have suggested that the decree brought up by this appeal is not what it is recited to be in the prayer for appeal in the Circuit Court, viz., the decree confirming the sale of the mortgaged property under that of foreclosure and sale, but one rendered subsequently thereto and merely in execution of it, and that it is, therefore, not the subject of an appeal, and claim that the present appeal should be dismissed for want of jurisdiction. The appeal prayed for and allowed in the Circuit Court is recited in the petition therefor filed March 26, 1879, to be as follows:

"From the decree entered April 12, 1877, confirming the report of the sale of the property of the defendant railroad company.

"From the decree of April 16, 1877, ordering the delivery of the deed and possession of the property to the purchasers, Frederick W. Huidekoper, Thomas W. Shannon, and John M. Dennison.

"From the decree entered in said cause on the 19th day of November, 1877, in favor of Frederick W. Huidekoper, Thos. W. Shannon, and John M. Dennison, and against the said Chicago, Danville and Vincennes Railroad Company, for the sum of $1,808,646.46."

The two decrees last named, of April 16, 1877, and of November 19, 1877, do not appear in the record.

An examination of the terms of the decree of April 12, 1877, shows that it is a decree confirming the report of the master upon a petition of the purchasers, Huidekoper, Shannon, and Dennison, asking that their bid may be satisfied by a surrender of bonds and coupons without further cash payment, and, upon that surrender, for a conveyance of the title to the property and to be let into possession. What prior action of the court upon a report of the sale had taken place, the transcript of the record before us does not disclose. Coun-

sel for the appellees state that there was in fact a prior decree, confirming the sale, rendered on February 26, 1877, from which no appeal was perfected, and produce in support of their statement what is called a supplemental transcript of the record containing such a decree. This, however, we cannot at present consider or act upon, further than to say that, in view of the suggestions made, and to enable the parties to present whatever questions arise upon the record as it is now before us, or upon a complete record when supplied, upon the appeal prayed for and perfected on March 26, 1879, the application for a rehearing is granted; and the decree of this court rendered at the present term, so far only as it reverses any of the decrees embraced in this appeal, is to that extent and for that purpose set aside.

GRANTED.

Statement of the case.

ASA JOHNSON AND THOMAS S. SANDFORD v. THE FLUSHING AND NORTH SIDE RAILROAD COMPANY.

May 8, 1882.

1. The reissue on April 16, 1872, of the original patent of May 19, 1857, of Asa Johnson for an improved method of fastening sheet metal on roofs, is broader than the original patent, and therefore void.
2. It appears from the evidence that the use of slotted plates and bolts to allow for the effect of changes of temperature was known prior to the original patent.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

On May 19, 1857, an original patent was granted Asa Johnson, the inventor, and to William Hughes and Henry Link, his assignees, "for an improved mode of fastening sheet metal on roofs," &c.

The specification declared the invention to be "a new and useful mode of self-adjusting fastenings for fastening metallic coverings to buildings, and in any and all other places where metals require fastening and their contraction and expansion demand accommodation."

(Appended to the specification are five figures illustrative thereof, which are referred to and described.)

The specification then proceeds as follows:

"In the operation of my invention, after sheeting the roof, if the boards do not exceed an inch in thickness, I bore a hole at the point where I wish to insert the stud, about the size as seen in vertical dotted lines in Fig 2. The holes may be made larger or smaller to allow for contraction and expansion, so that the studs can move freely in any direction required.

"The bottom-plate is then screwed firmly to the boards by the screws (*s*) (*s*) seen in Figs. 2 and 4, and the screw 1 passes through the metallic covering into the stud 2, thus firmly fastening the covering K to the stud, as seen in Fig. 2.

"It will be further seen that the cord 7 passes through the stud 2, Fig. 4, and then through the bottom-plate, and is fast-

ened together as at *g*, in said Fig., thus always keeping the stud in an erect position until attached to the metal.

"If the covering contract on a line parallel with the connecting-pin S, the adjustable connecting-rod 2 will move on it towards one of the flanges 4; when it expands it will move towards the opposite flange, thus moving towards the point of contraction, and from the point of expansion with this metallic covering.

"The adjustable stud, in addition to its parallel and longitudinal movement, is capable of a diagonal movement, thus accommodating itself to any direction required by the metal contracting or expanding.

"I contemplate using them as general fasteners when it is necessary to allow for the contraction and expansion of the material used, not confining myself to buildings only. I may find, in using my adjustable fasteners, it necessary to make some of them, those that are in parallel lines with the flanges, to fit up close to the sides of the studs, as seen at 1 1 in Fig. 2, allowing them to move in but one direction on the pin 3, which slides in the slots in the flanges 4 4."

The claim was thus set forth:

"In the self-adjusting fastener as described, for the purpose of attaching metallic coverings to buildings and accommodating itself to the contraction and expansion of the metal, and for fastening metals in all other places when the contraction and expansion demand accommodation, substantially as set forth, or any mechanical device equivalent thereto."

At the expiration of the original term of the patent, fourteen years, an extension of seven years was granted to Johnson, who subsequently assigned a two-thirds interest in his extended patent to his co-complainant, Thomas S. Sandford. Afterwards, on April 16, 1872, Johnson surrendered his original patent and took out a reissue of that date.

The specification of his reissue describes the invention generally as "a new and useful mode of self-adjusting fastenings for fastening metallic coverings to buildings, and for use in any

and all other places where metals require fastening, and their contraction and expansion require accommodation."

Then follows a reference to and description of the same five illustrative figures which form part of the specification of the original patent.

The specification then proceeds as follows:

"The principle of my invention consists in connecting the metal to be fastened with a bolt or pin arranged to slide in slotted bearings in the direction of expansion or contraction, said adjustable bolt and its bearings being combined with the materials to be fastened.

"I have found my adjustable fastener peculiarly useful in fastening metallic roofs to buildings, and I proceed to describe its construction and use.

"In using my self-adjusting fastener for fastening metallic roofs to buildings I connect the sliding bolt or pin with the roof by means of a stud fastened to the same, and I form the side-plates, which contain the bearings for the sliding-bolt, in connection with and as flanges of a bottom-plate, which is secured fast to the under side of the wooden sheathing of the building.

"In the drawing, 1 indicates the screws for attaching the metallic roof to the stud; 2 is the stud; 3 is the adjusting bolt or pin, to which the metallic roof is connected by the stud and screw, said bolt passing through the stud 2 and through the slots of the side-plates or flanges; 4 4 are the side-plates or flanges, provided with slots, which form the bearings of the adjusting-bolts; 5 is a bottom-plate, used as a convenient means of attaching the side-plates to the wooden sheathing of the building; 6 6 are the slots in the side-plates in which the adjusting-bolt slides; 7 is an India-rubber cord which may be used in applying the adjustable fastener to buildings. It is connected with the stud by being passed through an opening in it. It then passes down on each side of the stud and through an opening in the bottom-plate, where it is fastened, as indicated at *g* in the drawing, and is used for keeping the

stud in an erect position until after the stud had been inserted through the sheathing from below, and until it is attached to the metal roof. Without some contrivance of this kind it would be difficult in the position indicated to keep the stud in position while the connection was being made.

"S S are the screws for attaching the bottom-plate, and with it the side-plates, to the sheathing. G is the sheathing of the roof greatly enlarged in thickness in proportion, to illustrate the details of the connection of the adjustable fastener to buildings. H is the metallic roofing.

"The method of using the invention in attaching metallic roofing to buildings is as follows: After sheathing the roof, a hole is bored in the sheathing, at the point where the adjustable fastener is to be used, of sufficient size to allow the connecting-stud to move in the same with the expansion or contraction of the metallic roof. These holes receive the slotted flanges or side-plates, 4 4, and they are indicated in the drawing by the letter *a*. (See Fig. 2.) They should be of the shape and size required by the extent and direction of the contraction and expansion to be allowed for. The flanges or side-plates are inserted in the holes, and the bottom-plate is then firmly secured to the boards or sheathing, G, by the screws, S S, as seen in Fig. 2. Where the sheathing is sufficiently thick, a hole may be bored into it to receive the fastener from above. The side-plates, 4, and adjusting-bolt, 3, are thus connected with the building. The connection with the metallic roof is then effected by holding the stud in an erect position by means of the rubber cord, and attaching the stud to the roofing by means of the screw 1. Both the wooden sheathing and the metallic roof are thus connected to the self-adjusting mechanism, consisting of the slotted side-plates and the bolt which slides in them.

"It is obvious that if the metal of the roofing contracts or expands in a line with the slots in the side-plates that the bolt will adjust itself to such contraction or expansion by sliding in the slots in the proper direction.

Statement of the case.

"On the other hand, in cases where the line of contraction or expansion may be diagonal, or at right angles to the line of the slots in the side-plates, the connecting-stud is arranged to slide upon the adjusting-bolt, as it is shown it may do in Figs. 2 and 3. Where, however, the movement is only sensible in the direction of the slots, the side-plates are made to fit up close, as seen at Fig. 2 in the illustrations marked *, where the side-plates or flanges are seen in cross-section, so that the only practical adjustability shall be in the direction of the slots.

"I contemplate using my invention as a general fastener where it is necessary to allow for the contraction and expansion of the material used, not confining myself to buildings only."

The first claim of the reissue was substantially identical with the one claim of the original patent. The second claim of the reissue was as follows:

"I claim, in combination with the adjusting-bolt and slotted side-plates, suitably connected to and combined with the materials to be fastened together for the purpose of accommodating the expansion and contraction of such materials with reference to each other, substantially as specified."

The bill in this case was filed to restrain the defendant railroad company from infringing the second claim of the reissued letters-patent.

The infringement complained of was the use by the railroad company of what is commonly known as the fish-plate joint for uniting the ends of railroad rails. It consists of two iron plates of proper shape and size to fit the "web," which is the upright portion of the rail between its head and base. The plates are fastened one on each side of and near the ends of two abutting rails by means of bolts and nuts, the bolts passing through corresponding holes formed in both the plates and rails. In order to permit the rails to expand and contract with the changes in temperature, their ends are not allowed to form a close joint, and the holes, either in the fish-plates or in the

rails, are made larger than the bolts, and are elongated in the direction of the length of the rails. By these means the expansion and contraction of the rails is "compensated" without injury to the joint.

The defenses set up in the answer of the appellee were the invalidity of the reissue, because, as was alleged, the original patent was not lawfully surrendered, and the reissue was not lawfully issued, and want of novelty in the invention covered by the second claim of the reissue. The appellee also denied infringement.

The Circuit Court dismissed the bill, holding that the reissued patent was void because it was not for the same invention as that described in the original patent.

The appeal of the complainants has brought the case to this court for review.

Thomas Bracken and *B. F. Butler*, for appellants.

Andrew Mc Callum and *S. D. Law*, for appellee.

WOODS, J.—The appellee insists that the invention covered by the second claim of the reissued patent, of which infringement is charged, is neither described in the specification nor claimed in the claim of the original patent, and that the reissue is therefore broader than the original patent, and consequently void.

It takes but slight comparison of the original and reissued patents to show that this contention of the appellee is well founded. The original patent was for a complicated contrivance, consisting of a number of old devices combined, and specially adapted to the fastening of metallic coverings to buildings, and for use in all other places where metals require fastening and their contraction and expansion require accommodation. To make the invention of any practical value for the purpose suggested in the specification to the original patent, and for use in the "other places" referred to, all the parts of the device therein described, except, perhaps, the rubber cord,

which is only for temporary use in applying the device, are absolutely essential. Nowhere in the specification is it indicated or suggested that any part of the device described can be dispensed with. It is perfectly clear that the stud and bottom-plate of the contrivance are absolutely necessary to the only specific use mentioned in the specification. If these are left out there is no connection between the two materials to be fastened together, namely, the metal roof and the wooden sheathing under it. As the declared purpose of the invention is the fastening of these two materials together, it is difficult to see how the parts of the device essential to the fastening can be discarded and the invention still remain perfect and unchanged.

On recurring to the second claim of the reissued patent, we find that the metal roof to be fastened, the stud, the bottom-plate, and the screw which fastens the metal roof to the stud are all eliminated from the invention, and there is nothing left but the adjusting-bolt (3) and the slotted side-plates (4 4). As thus left, it is impossible to apply in a practical manner the device to the fastening of sheet iron to a roof, or the fastening of any sheet metal to anything whatever.

If the second claim of the reissued patent, as insisted by appellants, covers the fish-plate joint used by the appellee, it must cover a combination of (1) the two materials to be fastened together; (2) two slotted side-plates on opposite sides of the materials to be fastened, which serve as clamps to hold such materials in position; (3) the adjusting-bolt. The claim is so interpreted by the expert witness of appellants. Under the original patent the materials or things to be fastened together are the metallic covering of the roof and the under surface of the wooden sheathing on which it is laid. The slotted plates or flanges are fastened to the under side of the sheathing by the bottom-plate, which connects the flanges, and they form a support for the adjusting-bolt; but the slotted flanges do not embrace or clamp any part of the wooden sheathing, or any part of the metallic covering of the roof,

much less do they embrace or clamp at the same time the sheathing and the metallic covering, which are the things to be fastened together. But in the reissued patent the slotted plates not only furnish bearings for the bolt, but perform a new and essential function, of furnishing a strong lateral support to the materials to be fastened together by clamping the same between them.

We find, therefore, that in the reissued patent several of the devices essential to the combination described in the original patent are left out and a separate claim made for the parts which remain, and to these parts a new and essential function is given, which they could not perform under the original patent.

It is, therefore, perfectly clear that the second claim of the reissued patent was not covered by the original patent. It describes another device, operating in a different way and for a different purpose.

Under the circumstances of this case there can, in our opinion, be but one conclusion, and that is that the second claim of the reissued patent is void.

There was no error in the original patent caused by inadvertence, accident, or mistake, which could have escaped the notice of the patentee and his associates for fifteen years. It is not open to dispute that the fish-plate joint, precisely such as the appellants claim is covered by their reissued patent, was in general use during nearly the entire life of the original patent. Why did not the patentee earlier discover that all this use of the fish-plate joint was really an infringement on his patent and apply for a reissue and assert his rights? He has rested supinely until the use of the fish-plate joint has become universal, and then, after a lapse of fifteen years, has attempted by a reissue to extend his patent to cover it. We think it is perfectly clear that his original patent could not be fairly construed to embrace the device used by the appellee, which appellants insist is covered by their reissue. If the reisued patent covers it, it is broader than the original, and is, therefore, void.

(Giant Powder Co. *v.* Cal. Vigorit Powder Co., 6 Saw., 508; Powder Co. *v.* Powder Works, 98 U. S., 126; Ball *v.* Langle, 102 U. S., 128; James *v.* Campbell, decided at the present term.)

Even if the patentee had the right to a reissue if applied for in seasonable time, he has lost it by his laches and unreasonable delay. (Miller *v.* The Bridgeport Brass Co., decided at the present term.)

The defense of want of novelty set up in the answer is, in our opinion, also sustained by the evidence. The testimony shows that the device of employing slotted plates and bolts to allow of expansion and contraction caused by changes in temperature was applied in the manufacture of locomotives long before the year 1843, the earliest date at which Johnson, the original patentee, claims to have conceived his invention. By this contrivance the expansion and contraction of the boiler of the locomotive upon its frame, caused by alternate heating and cooling, was accommodated. This device was in common use before the year 1843, and it much more nearly resembles the fish-plate joint used for uniting the iron rails of a railroad than it does the contrivance described in the original patent of Johnson.

Many other instances of the application of the principle of this device prior to the date of Johnson's original patent are shown by the evidence. Among these were the use by the Newcastle and Frenchtown Railroad Company, in 1837, of iron rails embodying substantially the present fish-plate joint, and the use of the same device by the Oswego and Syracuse Railroad Company in 1848. In the first of these instances but one plate was used for each joint, and there was an oblong hole in one end only of every rail. In the second instance two plates were used to every joint, and the holes in both ends of the plates were oblong.

There are other instances of the use of this device for joining iron rails, which the record discloses. The evidence leaves no doubt upon our minds that the device now used by the

appellee and which is alleged to be an infringement on appellants' patent, was well known and publicly used for several years before the application of Johnson for his original patent in 1857.

An attempt is made to elude the force of the testimony on the question of novelty by introducing evidence to show that Johnson, as early as the year 1843, made a small model of a device similar, as is claimed, to the present fish-plate joint, and also some drawings upon the fly-leaf of a book of the same contrivance, and these, it is claimed, show that Johnson was the first inventor of the fish-plate joint, and that his patent, afterwards obtained in 1857, cut off the claims of intermediate inventors, if any such there were.

We have examined the model referred to, and cannot see that it contains any suggestion of the fish-plate joint. It is simply an oblong strip of sheet iron, having its sides bent over so as to form flanges, and with four oblong holes in each flange corresponding with similar holes in the other, and a bolt to pass through the corresponding holes in the flanges. The model is a single piece of sheet iron, supposed to represent an iron rail. There is no suggestion that it is to be connected with any other rail, and there are no plates or bars with which to make the connection. If the model suggests anything, it is simply the use of a bolt in slotted holes, which, as the testimony in this case shows, was a device in common use in many ways long before the year 1843.

It is alleged that the model spoken of was made by Johnson when he was about twenty years of age. It does not appear that at this time he had ever seen an iron rail such as those to which a fish-plate joint can be applied, or that he had ever seen a railroad. According to Johnson's testimony the model, when finished, was placed by him upon the plate under the eaves of a wood-house, where it remained, unseen by any one, for thirty-three years, until the spring of 1876, when he returned to the place where he had lived in 1843 and got the model for the purposes of this suit.

Opinion of the court.

It is sufficient to say that the proof fails to show that Johnson, in 1843, or at any time before the fish-plate joint for uniting iron rails came into use, was the inventor of that device, or that he ever invented it at all. It was not described in his original patent, and he never set up any claim to it until the year 1872, when its use had become universal wherever railroads were constructed.

On both grounds, therefore, the invalidity of the reissued patent and want of novelty in the invention which appellants contend was covered by the original patent, we are of opinion that the Circuit Court was right in dismissing the bill. Its decision must therefore be affirmed.

AFFIRMED.

APPENDIX.

THE following have been the Judges who composed the Court and took part in the decisions of the present term:

Chief Justice WAITE.	Justice WOODS.
Justice FIELD.	Justice MATTHEWS.
Justice MILLER.	Justice GRAY.
Justice BRADLEY.	Justice BLATCHFORD.
Justice HARLAN.	

Justice GRAY was appointed to fill the vacancy caused by the death of Justice CLIFFORD. He took the oath of office on January 9, 1882.

Justice BLATCHFORD was appointed to fill the vacancy caused by the resignation of Justice HUNT. He took the oath of office April 3, 1882.

The following new rules have been adopted during the present term:

PROMULGATED JANUARY 16, 1882.

OCTOBER TERM, 1881.

RULE 32.

Writs of Error and Appeals under Section 5 of the Act of March 3, 1875.

1. Writs of error and citations under section 5 of the act of March 3, 1875, "to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for others purposes," for the review of orders of the Circuit Courts dismissing suits, or remanding suits to a State court, must be made returnable within thirty days after date, and be served before the return day.

2. In all cases where a writ of error or appeal is brought to this court under the provisions of such act, it shall be the duty of the

plaintiff in error or the appellant to docket the cause and file the record in this court within thirty-six days after the date of the writ or the taking of the appeal, if there shall be a term of the court pending at that time, and if not, then during the first six days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. As soon as such a case is docketed the record shall be printed, unless the parties stipulate to the contrary, and file their stipulations with the clerk.

4. All such cases will be advanced on motion, and heard under the rules applicable to motions to dismiss.

5. When a writ of error or appeal has already been brought, or may hereafter be brought before this rule takes effect, the defendant in error or the appellee may docket the cause and file the record without waiting for the return day, and move under this rule.

6. In all cases where a period of thirty days is included in the times fixed by this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, and Nevada.

7. This rule shall take effect from and after the first day of May next.

PROMULGATED JANUARY 23, 1882.

EQUITY RULE 94.

Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

SUPREME COURT OF THE UNITED STATES.

Order Entered April 3, 1882.

There having been an Associate Justice of this Court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.
Second " SAMUEL BLATCHFORD, Associate Justice.
Third " JOSEPH P. BRADLEY, Associate Justice.
Fourth " MORRISON R. WAITE, Chief Justice.
Fifth " WILLIAM B. WOODS, Associate Justice.
Sixth " STANLEY MATTHEWS, Associate Justice.
Seventh " JOHN M. HARLAN, Associate Justice.
Eighth " SAMUEL F. MILLER, Associate Justice.
Ninth " STEPHEN J. FIELD, Associate Justice.

INDEX OF SUBJECTS.

ADMIRALTY LAW.

I. Where and How Far Operative.

1. The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. The principles laid down on this subject in Norwich Co. *v.* Wright, 13 Wall., 116, and in The Lottawana, 21 Wall., 558, reasserted and affirmed. *Steam Navigation Co.* v. *Dyer*, 277.

2. The courts of every country will administer justice according to its laws, unless a different law be shown to apply; and this rule applies to transactions taking place on the high seas. If a collision occur on the high seas between two vessels, controversies arising therefrom will be governed in the courts of this country by our laws, unless the two colliding ships belong to the same foreign country, or, perhaps, to different countries using the same law, when they will be governed by the laws of the country to which they belong. *Id.*

II. Damages for Loss of Goods on High Seas.

1. The rule of damages in case of goods lost or destroyed on the high seas by the fault of those in charge, is the price or value of the goods at the place of shipment, with all charges of lading, insurance, and transportation, and interest at six per cent. per annum, but without any allowance for anticipated profits. *Id.*

2. When the goods have no market value at the place of shipment, resort may be had to other means of ascertaining their actual value, such as the price which they usually bring at the port of destination, with a fair deduction for profits and charges. *Id.*

III. Damages in Collision Cases.

1. Upon a libel in admiralty for a collision, the libelant may be allowed damages for the loss of the use of his vessel while laid up to repair the injuries thereby suffered; and if at the time of the collision she was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be otherwise satisfactorily ascertained, the average of the net profits of her trips for the season may be adopted as the measure of the allowance. *The Potomac*, 839.

2. A vessel being insured on two-thirds of her valuation by valued policies, by which, in case the insurers should pay any loss, the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for account of the insurers, if requested, and that they should be entitled to such pro-

portion of the damages recovered as the amount insured bore to the valuation in the policies, the assured filed a libel in admiralty against another vessel for damages suffered by a collision. The insurers paid the libelant two-thirds of that damage, and released and assigned to the owners of the libelled vessel all their right in any damages growing out of the collision. It appearing that the collision was owing to the fault of both vessels, the libelant could recover only half of the damages sued for: *Held*, That one-third of the sum paid by the insurers must be deducted from the amount to be recovered. *Id.*

IV. BILLS OF LADING—HOW FAR BINDING.

1. The legal character and effect of a bill of lading stated in reference to its negotiable quality. *Pollard* v. *Vinton*, 320.

2. Neither the master of a vessel nor the shipping agents of steamboats on the rivers of the interior, at points where they receive and deliver cargo, have authority to bind the vessel or its owners by giving a bill of lading for goods or cargo not received for shipment. *Id.*

3. Such a bill of lading, being outside of the power conferred by the agent's authority, is void in the hands of a person who may have afterwards in good faith taken it and advanced money on it. *Id.*

V. APPEALS IN.

1. Under the act of February 16, 1875, a bill of exceptions is only necessary to ingraft upon the record such rulings of the court, excepted to at the time, as otherwise would not be a part of it; but the findings of the court and errors arising on them are reviewable without any bill of exceptions. *Nickerson* v. *Steamship Co.*, 360.

2. Although a District Court in admiralty, by rule, requires appeals from its decisions to be in writing, yet where, in the decree, a party inserts a clause announcing his intention to appeal, and the court fixes the bond, and afterwards accepts the bond, the necessity of an appeal in writing was dispensed with, and the jurisdiction of the Circuit Court attached. *Winslow* v. *Wilcox*, 394.

3. A provision by a rule of the District Court that its clerk should deliver the record to the clerk of the Circuit Court, if not complied with, does not prevent the Circuit Court from entertaining the cause. *Id.*

4. A cross-appeal, even though the other appellant has docketed his appeal, must be prosecuted like all other appeals; and hence where an appellant did not enter his appearance in this court, or take any steps to make himself an actor for nearly two years after docketing his appeal, it was *dismissed* for want of prosecution. *Id.*

5. Although the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, yet its actual jurisdiction is limited to whatever particular classes of cases or modes of proceeding which Congress sees fit to prescribe; and the act of 1875, limiting, on appeals in admiralty, the power of review to questions of law arising on a finding of facts by the inferior court, is constitutional. *The Francis Wright*, 487.

6. While exceptions may be taken to the failure of the inferior court to insert in its findings material evidence, or to its finding as a fact a thing which there is no evidence to prove, yet exceptions cannot be taken to its failure to find mere incidental facts, only bearing on the ultimate fact, and not necessary to its determination. *Id.*

7. Bills of exceptions should present only separate and distinct points of law; and those which, under the guise of excepting to the failure to find certain facts, set out substantially the whole evidence, and in that way endeavor to procure a review of the decisions of fact by the lower court, cannot be considered. *Id.*

VI. TORTS TO PERSON.

A libel *in personam* for damages received by a person who had gone on board a vessel moored at a wharf for the purpose of ascertaining whether he had a consignment by such vessel, it being customary with the officers to allow parties to come on board for such purposes, and who had been injured by a bale of cotton being negligently allowed to fall on him, is a maritime tort, and cognizable in the admiralty. *Leathers* v. *Blessing*, 777.

VII. CHARTER-PARTY.

Parties engaged in transporting fresh beef from Texas to the North by refrigerating process, charter a steamer, but without specifying in the charter the purpose for which she was to be used; her boiler leaking, it took a long time to make the voyage, and the beef spoiled: *Held*, That the warranty of seaworthiness in the charter meant only that she was capable of making the voyage, and not that she was bound to make it in any particular time, nor that she was suitable for carrying fresh beef. *The Francis Wright*, 487.

VIII. See *Limited Liability Act.*

AFFREIGHTMENT.

See *Admiralty.*

AGENCY.

See *Corporations.*

ALIENS.

RIGHT TO TAKE OR HOLD REALTY IN MISSOURI.

1. The Missouri statutes of descent, as regards aliens, *construed* to mean that aliens residing in the United States who have made a declaration of intent to become citizens, and those residing in Missouri whether they have made such declaration or not, are entitled to acquire and hold real estate; and that the right conferred upon aliens by the act of 1855 to sell and convey real estate within a prescribed time referred only to cases in which the property would vest at once in the State for the want of some person who could inherit, and had no reference to those classes who were allowed to acquire and hold in

the same manner as citizens of the United States, as above set forth. *Sullivan* v. *Burnett*, 671.

2. And the section of the statute declaring that "in making title by descent it shall be no bar to a demandant that any ancestor through whom he derives his descent is or has been an alien," *construed*, in view of the policy of Missouri on the subject, and notwithstanding the case of McCreery *v.* Somerville, 9 Wh., 354, to allow the children of an alien ancestor to inherit and claim through that ancestor, although such ancestor, at the time descent was cast, was living and himself incapable of inheriting. *Id.*

3. The Missouri statute of March 30, 1872, conferring upon aliens the power to acquire and hold real estate, is prospective in its operation. *Id.*

ARMY OF THE UNITED STATES.

PAY OF RETIRED OFFICERS.

1. Army officers retired from active service with reduced pay are still in the service, and are entitled to the increased pay which the law allows for every five years' service while in that condition as well as when in active service. *United States* v. *Tyler*, 224.

2. The ten per centum increase of pay which the statute allows for every period of five years is to be computed on the sum primarily fixed as salary per annum, with the increase for each five years previously earned added to that sum, when its increase for any new period of five years is to be computed. *Id.*

BANKS AND BANKING.

LIEN ON STOCK.

A State statute regulating banks provides that their stock shall be transferable on the books of the corporation only, as regulated by by-laws, but that stockholders indebted to the bank should not transfer their stock without paying or securing the debt. A firm transferred to a party, as collateral security for a loan, certain shares of a State bank, who sent the certificate to the cashier and requested a new certificate, and received in reply a letter agreeing to transfer the stock in a short time, it being the custom of the cashier to attend to the stock transfers without consulting with the directors, and the cashier credited him with the stock on the bank books. The cashier was a member of the firm assigning the stock. The firm failed, heavily indebted to the bank, which then refused to transfer the stock. On suit in equity to compel it: *Held*—

1. That the bank, by the act of its cashier, which was binding on it under the circumstances, had waived its lien on the stock, though originally entitled to it;

2. That the title to the stock passed independent of the certificate, which is mere evidence of title, when the bank credited the holder with it on its books, and that the bank thereby irrevocably

consented to trust him just as if he were an original subscriber to its stock;

3. That by delaying the assertion of its claim till the party holding the stock had lost all chance of obtaining other security, and by leading him to suppose himself secure by its course of dealing with him, it was estopped from asserting any lien that it had. *Bank* v. *Bank*, 400.

BANKRUPTCY.

I. FRAUDULENT PREFERENCE.

1. An agreement between a tanner and a leather merchant, by which the latter is to make certain advances for the purpose of enabling the former to tan certain skins and ship them to the merchant, and in which the skins, &c., before shipping, are pledged to the merchant as security, creates an equitable charge, which is good as between the parties, even without recording or a change of possession, and hence is good against the tanner's assignee in bankruptcy, who succeeds only to his rights; and therefore a subsequent agreement, *bona fide* made between the tanner and the merchant just before the filing of the petition in bankruptcy by the former, and with knowledge of the bankruptcy, which puts the latter into possession in pursuance of the former agreement, is not a fraudulent preference under the bankrupt act. *Hauselt* v. *Harrison*, 470.

2. A mortgage executed by an insolvent debtor with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from the record for two months, is void under the bankrupt act, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor. *Blennerhassett* v. *Sherman*, 571.

II. SECTION 5057 OF THE U. S. REVISED STATUTES.

Section 5057 of the Revised Statutes of the United States, requiring the assignee in bankruptcy to bring suit on all claims for the bankrupt estate within two years after the cause of action accrued, &c., does not impose a jurisdictional requirement and deprive the court of the power to entertain such a suit after the lapse of that time; but it is a statute of limitations and governed by the principles applicable to statutes of limitations. *Upton* v. *McLaughlin*, 721.

III. WHEN PRIOR SUIT MAY BE PROSECUTED IN NAME OF BANKRUPT.

1. Inasmuch as an assignment of a claim made more than four months before going into bankruptcy leaves no interest in the assignor to vest in the assignee in bankruptcy, a suit on such assignment in the name of the assignor for the benefit of the transferees is main-

tainable, and need not be revived in the name of the assignee in bankruptcy. *Thatcher* v. *Rockwell*, 41.

2. A suit instituted before proceedings in bankruptcy by one who afterwards becomes a bankrupt may be prosecuted in the same form, if the assignee consents thereto, without making the assignee a party on the record; and inasmuch as the assignee in such event is bound by the decision, the debtor is sufficiently protected, and cannot set up bankruptcy of the creditor as a defense. *Id.*

IV. See *Corporations; Fraudulent Conveyances.*

BILL OF EXCEPTIONS.

1. The practice of setting out in the bill of exceptions the entire charge of the court, instead of those parts only which are complained of, again condemned. *United States* v. *Rindskopf*, 652.

2. See *Admiralty; Error and Appeal.*

BILL OF LADING.

See *Admiralty.*

BRIDGES.

See *Constitutional Law.*

CAUSATION.

See *Negligence.*

CLAIMS AGAINST GOVERNMENT.

SECTIONS 3220 AND 3228 OF THE REVISED STATUTES OF THE UNITED STATES CONSTRUED.

1. An allowance of a claim by the Commissioner of Internal Revenue under section 3220 of the Revised Statutes of the United States for taxes, &c., illegally assessed, is equivalent to an account stated between private parties, and is binding on the United States until impeached for fraud or mistake, and is *prima-facie* evidence of the amount due, and if not paid on application to the Treasury Department, the Court of Claims has jurisdiction of an action based thereon; because such an allowance raises an implied promise on the part of the United States to pay any amount actually due the claimant, and a claim for the payment of such allowance is founded on an act of Congress within the meaning of the law defining the jurisdiction of that court. *United States* v. *Savings Bank*, 45.

2. The lodging of the appeal made out in due form with the proper collector of internal revenue for the purpose of transmission to the Commissioner in the usual course of business, under the requirements of the regulations of the Secretary, was in legal effect a presentation of the appeal to the Commissioner under the provisions of section 3228 of the Revised Statutes of the United States. *Id.*

COMPROMISE.

See *Res Judicata.*

CONFEDERATE CURRENCY.

On the 5th of December, 1863, after the proclamation of emancipation, and in that part of Virginia the people of which were in rebellion against the United States, one resident therein sold and delivered to another a number of slaves, with warranty of title, but not of soundness, the purchaser covenanting "to pay on delivery the sum of twenty-five thousand dollars in bankable Confederate currency, and in addition to give his note," with two persons named as sureties, "for the further sum of twenty thousand dollars, to be paid in twelve months after call, in equal annual payments thereafter, or, at the purchaser's option, it may be, on call, all or a part paid;" and the seller covenanting "not to call upon the purchaser for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call." On the 1st of January, 1864, the purchaser, in lieu of the note, made to the seller two bonds, with the same persons as sureties, to pay eight thousand dollars "on demand, or twelve months thereafter, at the option of the obligors," and twelve thousand dollars "on demand, or two years thereafter, at the option of the obligors," "in the bankable currency of the day, according to the agreement of the 5th of December last;" "the said demand shall be made in writing by the obligee, his heirs or legal representatives only." Payment of the bonds was demanded in writing by the obligee after the end of the war of the rebellion, and when the bankable currency of Virginia consisted wholly of notes of the United States or of the national banks: *Held*, in an action on the bonds, That the plaintiff had no ground of exception (1) to the admission of evidence that, at the time of the making of the agreement and the bonds, Confederate currency was bankable and was the only currency in circulation in Virginia, the value of gold in relation to such currency was as nineteen or twenty to one, slaves were not being sold at all for gold, and these slaves were not worth in Confederate currency so much as forty-five thousand dollars, and that before the war, when the price of slaves was at its highest, such a lot of slaves would not have been worth more than a fifth of that sum in gold; (2) to an instruction to the jury that, if they found that the bonds were made in reference to Confederate currency, the plaintiff was entitled to recover the amount therein stipulated to be paid, at the value of Confederate money compared with national currency at the time of the making of the bonds. *Rives* v. *Duke*, 365.

CONSTITUTIONAL LAW.

I. POWER OF STATE LEGISLATURE OVER CORPORATE CHARTERS AND PROPERTY.

1. Where the Legislature of a State has repealed the charter of a

street railroad company, and transferred its franchises and track to another, and the corporation refuses to seek a remedy in the courts, a stockholder of the company will have a standing in a court of equity, who asks an injunction on the ground that the repealing statute impairs the obligation of a contract. *Greenwood* v. *Railroad Co.*, 227.

2. Such a statute does impair the obligation of the contract of the charter, unless there is reserved to the Legislature the right to repeal the statute under which the company was organized. *Id.*

3. In the State of Massachusetts such a reservation becomes part of every act of incorporation, by virtue of the following language in section 41, chapter 68, of the General Statutes, to wit: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature." The court here gives a history of the origin of this and similar clauses of reservation in the statutes of the States. *Id.*

4. The effect of the repeal of an act of incorporation under such a clause is that the statute no longer exists, and whatever force the law may give to transactions entered into, and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights. *Id.*

5. The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal; and if the Legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power. *Id.*

6. If the repeal of the old corporation was within the power of the Massachusetts Legislature, it could charter a new one, and confer the same powers on it as the former had possessed, and, so far as the property or franchises of the old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor. *Id.*

7. A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the Constitution of the United States if it provides for compensation for the property of the extinct corporation so taken by the new one. *Id.*

II. POWER OF STATE LEGISLATURE TO AUTHORIZE AID TO INTERNAL IMPROVEMENTS.

1. The Legislature of a State, in the absence of constitutional prohibition, can authorize municipalities to aid in the construction of railroads owned and managed by private persons. *Taylor* v. *Ypsilanti*, 326.

2. The act of the Legislature of Michigan of March 24, 1869, authorizing certain municipalities to aid in the construction of a railroad, is not in conflict with sections 6, 8, and 9 of article 14 of the Michigan Constitution forbidding the credit of the State from being granted to private persons or corporations, and forbidding the State from subscribing to the stock of any corporation or from being interested in any work of internal improvement, and forbidding any person from being deprived of property without due process of law. *Id.*

III. POWER OF STATE LEGISLATURE TO APPLY. LIMITATIONS TO EXISTING CAUSES OF ACTION.

It is within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement shall be barred unless brought within a less period than that prescribed when the contract was made, or the liability incurred, from which the cause of action arose. The exertion of this power is, therefore, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law before the bar takes effect. *Koshkonong* v. *Burton*, 152.

IV. POWER TO DECLARE MEANING OF STATUTE.

If interest upon interest, whether arising upon express or implied agreement, is allowed by the local law at the time of the contract, that right cannot be impaired by a subsequent legislative declaration as to what was, in the judgment of that department, the true intent and meaning of the statutes, prescribing and limiting the rate of interest, in force when the contract was made. The utmost effect to be given to such legislative declaration is to regard it as an alteration of the existing law in its application to future transactions. *Id.*

V. COMMERCIAL CLAUSE OF FEDERAL CONSTITUTION.

1. A telegraph company is an instrument of commerce, and, if it accepts the provisions of the United States Revised Statutes in regard to telegraph companies, is a government agency. *Telegraph Co.* v. *Texas*, 447.

2. A tax by a State of a certain amount for every message sent by a telegraph company is constitutional only as respects messages from one place to another within its own limits. Attempts to tax messages sent out of the State are void as being regulations of interstate commerce; and attempts to tax government messages are void as burdens on the constitutional agencies of the Federal government. *Id.*

3. A city ordinance imposing a rate of charge on vessels landing at wharves owned by the city, graded according to their tonnage, and also a penalty for landing anywhere else than at such wharves, is neither a tax in a general sense, nor a tax on tonnage in the meaning of the United States Constitution. *Packet Co.* v. *Board of Trustees*, 811.

4. A city, if allowed by its charter, has a right to build such wharves and charge for their use, and also to prescribe where vessels shall land

and discharge cargo; and the exercise of such right, if a regulation of commerce at all, is valid as long as Congress fails to make any provision on the subject. *Id.*

5. Although relief might probably be given against an oppressive abuse in the exercise of such right and in the rates of wharfage charged, yet the facts alleged in the case at bar do not prove that the rates in question are excessive. *Id.*

6. The court, after reviewing the congressional legislation on the subject of bridging the public waters of the United States, and especially the act passed May 3, 1869, authorizing the construction of the Newport and Cincinnati bridge, which contained a reservation of the right to withdraw assent in case the free navigation of the river shall be substantially and materially obstructed, decides that the United States are not liable for the cost imposed upon the bridge company by the alterations made necessary by the subsequent act of March 3, 1871, the right to impose such requirements being a limitation which formed a part of the original grant. *Bridge Co.* v. *United States*, 878.

7. And this is true notwithstanding any rights conferred upon the bridge company by State law, such rights being subject to the supreme power of Congress. *Id.*

8. The question whether a bridge is such an obstruction to navigation as to justify Congress in withdrawing a consent previously given to its erection is a question to be decided by Congress, and is not a judicial question for the courts. *Id.*

9. Although the franchise to erect a bridge is a species of property, yet from its origin its continued existence was dependent on the will of Congress, and it might be altered or abolished without making compensation. *Id.*

VI. LOUISIANA FUNDING ACT.

A funding act of a State authorizing the funding of its debt, but excluding from its provisions some bonds of doubtful validity until their validity was established by a decree of a court in a proceeding provided for that purpose, does not impair the obligation of those bonds, even though in that special proceeding proof of their invalidity is allowed as against a *bona-fide* holder. *Guaranty Co.* v. *Board of Liquidation*, 508.

VII. PROVISION REQUIRING STATUTE TO EMBRACE BUT ONE OBJECT.

An act "to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," which provides for the funding of the municipal indebtedness, is not repugnant to the article of the State Constitution which requires every legislative act to embrace but one object, which shall be expressed in its title; for the requirement of the Constitution is satisfied if the different provisions of the act are all germane to the general subject indicated by the title. *Louisiana* v. *Pilsbury*, 514.

VIII. PROVISION REQUIRING UNIFORMITY OF TAXATION.

Article 127 of the Louisiana Constitution of 1845, providing that

"taxation shall be equal and uniform throughout the State," and that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied," applies only to State and not to municipal taxation, and did not require that all property in the State should be taxed, but simply that all property which was taxed should be equally taxed. *Id.*

IX. OBLIGATION OF CONTRACTS—ACT IMPAIRING REMEDY.

1. The act of the Louisiana Legislature of March 6, 1876, funding the former debts into premium bonds, providing that a certain number of these should be paid each year, determining what ones were to be paid by chance in a lottery, providing a certain tax for the payment of the ones so selected, and postponing for fifty years the payment of either principal or interest of the remainder, repealing the special tax above mentioned and the power of the city council to levy any tax for the payment of any other bonds or interest, and abolishing the writ of mandamus for the enforcement of payment of any other bonds, is totally null and void, (1) because it abolishes the special tax provided by the act of 1852 and provides no other sufficient means of raising the money necessary to fulfill the contract made by this latter act; (2) because it abolishes the remedy of mandamus existing when the contract was made, and substitutes no sufficient remedy in its stead. *Id.*

2. A State statute which, in authorizing a city to convert its ownership of a valuable property held for the use of the public into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, does not impair the obligation of contracts, the property so converted having been equally exempt. *New Orleans* v. *Morris*, 802.

X. See *Admiralty.*

CONTRACTS.

I. CONSTRUCTION OF.

A contract with a company furnishing building stones in which the party receiving them agreed to pay "the sum of 65 cents per cubic foot for all stones when the quarried dimensions do not exceed 20 cubic feet in each stone, and one cent additional for every cubic foot of those having such dimensions exceeding 20 feet," *construed* to mean that the additional compensation was to be estimated on every cubic foot contained in blocks exceeding 20 feet in dimensions, and not merely on every cubic foot in excess of 20 feet in such blocks. *United States* v. *Granite Co.*, 312.

II. EFFECT OF BREACH BY ONE PARTY—DAMAGES.

A book agent contracts with a publishing-house to canvass for a certain work to be published in serial volumes. After having obtained subscribers in large numbers, he takes the agency from another house to canvass for a rival edition of the same work, and induces many of the former subscribers to take for the volumes not yet issued the rival edition. On applying to the house first employing him to furnish

volumes to fill his orders, they refuse to do so, except for cash accom panying the order: *Held*—

1. That having abrogated the contract by his own act, he coul not claim the benefit of a provision in that contract giving hin credit.

2. That even if his acts did not amount to an abrogation of th contract, it was his duty to save himself from all loss possible; an he could charge the delinquent only with such damages as he coul not reasonably prevent.

3. That in case of a violation of a contract to sell on a certai credit, the measure of damages is interest for the period of th credit. *Warren* v. *Stoddart*, 657.

III. ACT FUNDING NEW ORLEANS DEBT.

1. Section 37 of the act of the Louisiana Legislature of February 23 1852, consolidating into one the three previously existing municipali ties within the limits of New Orleans, adding to it the adjacent city of Lafayette, providing for funding the debts of the old corporations into obligations of the new, and providing a special annual tax for the payment of the interest and for a sinking fund, became, as soon as the bonds were put on the market and purchased, a contract, of which the provision for the annual tax was an essential part. *Louisiana* v. *Pilsbury*, 514.

2. A change of judicial construction of a statute or of the organic law is prospective only as far as it affects existing contract rights. *Id.*

3. The acceptance by the creditors of their interest raised in a different mode than that prescribed in the contract is no waiver of their right to insist on the contract. *Id.*

IV. IN GENERAL.

1. The contract of Harvey & Livesey with the United States to build a bridge at Rock Island, Illinois, should be construed in connection with the advertisement calling for bids and the bids; and so construed it was the duty of the government, and not of the contractors, to build the necessary coffer-dams. *Harvey* v. *United States*, 699.

2. The special act of Congress for their relief passed August 14, 1876, does not limit the equitable jurisdiction of the Court of Claims thereby conferred to the mere consideration of claims for labor done and materials furnished, but authorized it to adjust the accounts between the parties for all demands growing out of the contract. *Id.*

V. See *Constitutional Law; Courts of the United States; Grants.*

CORPORATIONS.

I. CHARTERED RIGHTS OF NEW ORLEANS.

1. The right of the city of New Orleans under Louisiana law is simply that of building levees and wharves on the river banks within its corporate limits for the public utility, with the exceptions established by paramount law, and of collecting reasonable wharfage for their actual

use; but it has not the exclusive right to collect wharfage within such limits, and it is no violation of its rights for a corporation holding by a good title a part of the river bank to collect wharfage for its use. *Railroad Co.* v. *Ellerman*, 291.

2. Even if such latter corporation has not under its charter the right to collect wharfage and its acts in so doing are *ultra vires*, yet one who is not a stockholder, and whose legal rights are not invaded by its so doing, has no such interest as entitles him to set up such alleged violation of its charter as a ground of enjoining the corporation from collecting wharfage. *Id.*

II. CONSOLIDATIONS.

Bonds voted to one company are not invalidated by being delivered to a consolidated company into which the first company had been merged, and which under a State statute succeeded to all the rights and privileges of the first company. *New Buffalo* v. *Iron Co.*, 353.

III. CHARTER EXEMPTING FROM TAXATION CONSTRUED.

1. Under a charter of a railroad exempting its capital stock and dividends to a certain amount from taxation, lands granted to the company by the State to aid in the construction of the railroad are not exempt. *Railroad Co.* v. *Loftin*, 361.

2. An Arkansas statute providing that certain swamp lands should be exempt from taxation for ten years or until reclaimed, *construed* to mean that they are exempt for ten years if not sooner reclaimed, but that the exemption ceases on reclamation. *Id.*

3. A section of the charter of a Louisiana charitable institution, enacted in 1853, provides that all its property shall be exempt from taxation either by the State, parish, or city in which it is situated, any law to the contrary notwithstanding: *Held*, That this exemption extended to all property used by the corporation for the purpose of raising revenue, whether such property was acquired before or after the adoption of the State Constitution of 1868 and the legislation adopted in pursuance thereof requiring all property to be equally taxed; and that the one hundred and eighteenth section of the State Constitution of 1868 and the legislative act of 1871 in pursuance thereof impair the obligation of a contract in so far as they attempt to tax such property of the charitable institution. *St. Anna's Asylum* v. *New Orleans*, 602.

4. And the four hundred and thirty-eighth article of the civil code, adopted in 1825, on the dissolution of corporations, which is a part of all charters granted by the Legislature, authorizes the amendment of the charter, if at all, only on making proper reimbursement, which in the case of a tax law would balance the tax. *Id.*

IV. MISNOMER.

The mere transposition of two of the words of the name of the railroad to which the aid was to be voted in the petition for and notice of the election authorizing the subscription, did not avoid the

donation nor the election, it being evident what railroad was intended. *Moultrie Co.* v. *Fairfield*, 140.

V. OVER-ISSUE OF STOCK.

1. When the amount of the capital stock of an incorporated company is limited by its charter, all stock issued in excess of the limit is unauthorized and void. *Scovill* v. *Thayer*, 179.

2. A holder of such unauthorized stock is not entitled to any of the rights, or subject to any of the liabilities, of a holder of authorized stock. *Id.*

3. Holders of such unauthorized stock are not estopped to set up its invalidity as a defense to an action in the interest of creditors brought against them, to recover the balance unpaid thereon, by the fact that they attended the meeting at which it was voted to issue the same, or that they received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock. *Id.*

4. When the company which has issued stock beyond the limit prescribed by its charter has been adjudicated bankrupt, the holders of the unauthorized stock are not entitled to have money paid thereon applied as a credit on the unpaid balance due on the authorized stock held by them. *Id.*

VI. ASSESSMENTS ON STOCK—LIMITATION TO SUITS FOR.

Subscribers to the stock of an incorporated company paid twenty per cent. on their shares, and it was agreed between them and the company that no further assessments should be made thereon, and certificates for full-paid shares were issued to them. The company was adjudicated bankrupt, and it became necessary to assess the unpaid stock to satisfy claims of creditors of the company: *Held*—

1. That the agreement between the company and its stockholders was in equity void as to creditors.

2. That before an action at law could be maintained by the assignees in bankruptcy against a stockholder to recover upon his unpaid subscription of stock, some proceeding in the interest of creditors in a court of competent jurisdiction, to set aside the agreement between the stockholders and the company, and to make an assessment upon such unpaid stock, was necessary.

3. That until such order of the court and assessment, or some authorized demand upon the stockholder to pay the balance due on the stock, no cause of action accrued against him in favor of the assignees, and the limitation prescribed by the second section of the bankrupt act did not begin to run in his favor. *Id.*

VII. LIABILITY OF MUNICIPALITY FOR DEFECTS IN STREETS.

In a suit against a city for injuries caused by the unsafe condition of the embankment leading to a bridge to which a street of the city ran, the fact that the city owned stock and had advanced money to the corporation which held the title to the bridge does not make the city

responsible for its defects; but the question is, whether the city by its action had treated the embankment as a street or an extension of a street, which is a question of fact for the jury, and an instruction taking from the jury the right to pass on this question is erroneous. *Manchester* v. *Ericsson*, 567.

VIII. POWER OF LOUISIANA CITY, MISSOURI, TO ISSUE BONDS.

1. The city of Louisiana had, under the twenty-ninth section of the legislative act incorporating the Louisiana and Missouri River Railroad, the right to subscribe to the stock of said railroad, and, under the tenth section of the city charter passed February 16, 1865, the right to issue bonds to pay for such subscription, if authorized by popular vote. *Louisiana City* v. *Taylor*, 596.

2. Nor is this power so conferred by the charter repealed by the Constitution of Missouri that took effect on July 4, 1865, that being entirely prospective; nor by the seventeenth section of the general railroad law of Missouri of 1866, which is a mere enabling act, containing no words of prohibition and not inconsistent with the special power previously conferred by the charter. *Id.*

IX. POWER OF COURT OVER MANAGEMENT OF.

Courts will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is legal. *Oglesby* v. *Attrill*, 921.

X. WHAT SIGNATURE BY OFFICERS BINDS CORPORATION.

1. A bill of exchange, headed "Office of Belleville Nail Mill Co.," and concluding "charge same to account of Belleville Nail Mill Co., A. B., Pres't; C. D., Sec'y," is the bill of the company and not of the individual signers; and a declaration thereon against the latter as drawers, setting forth the instrument, and alleging it to be their bill of exchange, is bad on demurrer. *Hitchcock* v. *Buchanan*, 468.

2. A statute prohibiting defendants in actions upon written instruments from denying their signatures, except under plea verified by affidavit, does not apply to a case in which defendants demur because the instrument declared on appears upon its face to be the contract of their principal and not of themselves. *Id.*

XI. See *Constitutional Law; Equity; Banks and Banking.*

CORPORATION SECURITIES.

I. PRESUMPTIONS IN FAVOR OF BONA-FIDE HOLDER.

1. The act of Kansas of March 2, 1872, requires that bonds issued by counties to aid various public improvements, if subscribed conditionally, shall be deposited with the State treasurer in escrow till the performance of the condition. It also provides that the holder of such bonds shall present them to the State auditor for registration, who, on being satisfied that such bonds have been issued according to the provisions of the act, and that they are genuine, shall register them, and certify on them that they have been regularly issued and are gen-

nine. Certain bonds, unconditional on their face, issued by a county in Kansas, were fraudulently put into circulation without passing through the hands of the treasurer, and the certificate of the auditor fraudulently obtained: *Held*—

1. That the act did not require as a necessary prerequisite to their negotiability that they should in all cases pass through the hands of the treasurer before reaching the auditor.

2. That the action and certificate of the auditor is conclusive evidence, as between the county and a *bona-fide* holder, that the bonds, unconditional on their face, were regularly and legally issued, and therefore negotiable. *Lewis* v. *County Commissioners*, 199.

2. A legislative act requires that certain bonds of a city must be authorized to be issued by a majority of the tax-payers. By the charter of the city at the time of the election in question only tax-payers were qualified voters. The holder of the bonds in suit offered to prove this by the poll-books, which showed that a large majority of the votes cast was for authorizing the issue of the bonds, but did not show that the voters were tax-payers: *Held*, That the plaintiff was not bound to prove this latter fact, but that it would be presumed that the officers conducting the election received the votes only of those properly qualified, and hence that only tax-payers voted. *Hannibal* v. *Fauntleroy*, 497.

3. A city which has by a local statute the right to make a subscription on condition in aid of a railroad cannot, when its officers have issued its bonds containing no notice in their recitals of any condition, set up as against a *bona-fide* holder that the bonds are void for non-compliance with certain conditions, even though the statute authorizing their issue expressly provides that they shall not be valid till such conditions are complied with. *Insurance Co.* v. *Bruce*, 664.

4. Kohn *v.* Eagle, 84 Ill., 292, distinguished. *Id.*

5. Whether bonds of a city issued to make a donation to a manufacturing company managed by private enterprise are, in the sense of the law, for a municipal purpose or not, yet where those bonds recite on their face that they were issued for municipal purposes, the city is estopped, as against a *bona-fide* holder, from setting up that they were not issued for a municipal purpose. *Ottawa* v. *Bank*, 679.

6. County bonds issued in Missouri by a *de facto* County Court, sealed with the seal of the court and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court. *Ralls Co.* v. *Douglass*, 102.

7. It cannot be set up as a defense to bonds issued by counties in Missouri in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter. *Id.*

8. In a suit on certain coupon bonds of a county, to which the defense was made that the county had issued more bonds than was allowed by law, *held*, on the facts, that the class known as donation bonds were first authorized, and were valid, even conceding that the alleged limit in amount was exceeded by the class known as subscription bonds. *Moultrie Co.* v. *Fairfield*, 140.

9. Inasmuch as the bonds showed their regularity on their face and the authority under which they were issued, the *bona-fide* holder was not bound to look further and inquire whether the limit in amount had been exceeded. *Id.*

II. WHEN NEGOTIABLE BY DELIVERY.

By the decisions of the Illinois court of last resort municipal bonds payable to bearer, or to some named person or bearer, are negotiable by delivery only, so as to authorize the holder to sue in his own name, and do not require any indorsement to pass title. *Ottawa* v. *Bank*, 679.

III. BONDS ISSUED BY NEBRASKA PRECINCTS—REMEDIES ON.

1. In Nebraska, bonds issued by authority of a vote of a precinct for public purposes must be in the name of the county of which that precinct forms a part,—a precinct being a mere subdivision of a county, and not a separate political entity,—and suit on such bonds must be against the county, the judgment to be paid by a tax levied only on the taxable property of the precinct. *Davenport* v. *Dodge Co.*, 305.

2. Although the State statute authorizing the issue of such bonds provides the special remedy of a mandamus for their enforcement, yet inasmuch as a suit to get judgment on bonds or coupons is part of the necessary machinery of the Federal courts in enforcing the writ of mandamus—which is, in such courts, in the nature of an execution, and will not be issued till judgment is obtained—a suit to obtain such judgment is maintainable. *Id.*

IV. WHAT SUBSEQUENT AGREEMENT MAKES NEGOTIABLE.

A bond of a South Carolina corporation made originally payable to "W. J. Gayer, receiver," but with a subsequent indorsement by the obligor agreeing, in consideration of forbearance, to pay to bearer, becomes by such indorsement a negotiable instrument, although under seal, and its holder may sue on it in the Federal courts, although the original obligee could not. *Mining and Manufacturing Co.* v. *Bradley*, 384.

V. IN GENERAL.

1. Where a county judge made an order for the issue of certain bonds, assuming to act under a State law, and on appeal by the taxpayers this order was reversed, such judgment, between the original parties to the bonds was equivalent to a refusal to make the original order, and the bonds issued under it are invalid as between such parties. *Stewart* v. *Lansing*, 85.

2. A judgment that a party is a *bona-fide* owner of certain coupons does not establish that he is the *bona-fide* owner of the bonds. *Id.*

3. The plaintiff held on the facts not to have proved that he was a *bona-fide* holder of certain bonds. *Id.*

4. Bonds issued by counties in Missouri in 1870 and 1871 in payment of subscriptions to railroad stock, without a vote of the people, are valid if the subscription was made under authority of charters granted in 1857, which did not require such vote, the State Constitution of 1865 having been construed at the time of the issue of such bonds not to be retroactive. *Ralls Co.* v. *Douglass*, 102.

5. County bonds and coupons issued in 1870 and 1871 in payment of subscriptions to railroad companies were not required to be stamped by the United States internal revenue laws in force at the time of their issue, being exempt from taxation as official instruments issued by the officers of any State, county, town, or other municipal corporation. *Id.*

6. The execution of the bonds not being denied under oath, it was not necessary, according to Missouri practice, to prove the order of the County Court authorizing their execution. *Id.*

7. *Bona-fide* ownership of the coupons sued on being denied, it was not only proper but necessary to prove it. *Id.*

8. One section of the charter of a railroad provided that the counties along its line might make subscriptions or donations to the railroad after a popular vote authorizing it; and another section provided that a particular county might, by its board of supervisors, make a subscription of a certain amount, and did not require a popular vote: *Held*, That the two sections were not inconsistent, and that a donation might be made under one and a subscription under the other. *Moultrie Co.* v. *Fairfield*, 140.

9. It appearing that the donation was authorized in 1869, the bonds were not invalidated by the amended Constitution of Illinois of 1870, but come within the proviso of the first additional section of the same. *Id.*

10. It is no defense to a suit on the bonds that the payment of the same will require the levy of a tax greater than the State Constitution allows, even if the constitutional limit applies to the case at bar; as to which the court expresses no opinion. *Id.*

11. Limitation under the statutes of Wisconsin to actions upon coupons of municipal bonds issued in 1857, payable twenty years after date. The cause of action upon a coupon, whether detached from the bond or not, held to accrue, and limitation to commence, from its maturity; reaffirming Amy *v.* Dubuque. 98 U. S., 471. *Koshkonong* v. *Burton*, 152.

COSTS.

APPEALS FROM DECREES FOR—ADMINISTRATION OF TRUST FUNDS.

1. Whilst in ordinary cases an appeal does not lie from a decree in equity for costs only, yet it does lie when the costs are directed to be

paid not by a particular party, but out of a fund in the hands or under the control of the court. *Trustees* v. *Greenough*, 826.

2. A decree made by a Circuit Court of the United States directing the payment of costs and expenses out of a fund in court to the complainant—the fund, in the meantime, remaining in the court in course of administration—is *pro tanto* a final decree from which an appeal will lie to this court. *Id.*

3. It is a general principle that a trust estate must bear the necessary expenses of its administration. *Id.*

4. One jointly interested with others in a common fund, and who, in good faith, maintains the necessary litigation to save it from waste and destruction and secure its proper application, is entitled in equity to reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportional contribution from those who receive the benefit of the litigation. *Id.*

5. Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who, in good faith, files a bill to secure the due application of the fund, and succeeds in bringing it under the control of the court for the common benefit of the bondholders, is entitled to have his costs, counsel fees, and necessary expenses of the litigation—that is to say, his costs as between solicitor and client—paid out of the fund before its distribution. *Id.*

6. Such a complainant, however, is not entitled to an allowance for his private expenses, such as traveling fares and hotel bills, nor for his own time or personal services. *Id.*

7. The practice of allowing large and extravagant counsel fees and commissions to trustees, complainants, and receivers, and their counsel, to be paid out of trust funds under the control of the court, commented on and disapproved. *Id.*

COUNSEL FEES.

See *Costs; Evidence.*

COURT OF CLAIMS.

See *Claims against Government.*

COURTS OF THE UNITED STATES.

I. MATTER IN DISPUTE.

1. In a case where various land-owners are assessed by court commissioners, each for small sums, on their lands, although the aggregate of such assessments may exceed $5,000, yet, inasmuch as they are liable each only for his own assessment, the matter in dispute, as regards their right to appeal, is the separate amount assessed against each, and not the aggregate of such amounts. *Russell* v. *Stansell*, 221.

2. Where certain creditors secured by assignment bring a suit on behalf of all creditors secured thereby to set aside a prior assignment, and, on an adverse decision, appeal, the matter in dispute as regards them is simply their proportionate share of the fund that would be realized in the event of success, and not the entire fund; nor can any portion of the fund that would go to creditors not before the court be taken into account. *Chatfield* v. *Boyle*, 81.

3. Where the officer of a county enters into contracts to sell different pieces of land of the county to different parties, who subsequently, on the failure of the county authorities to comply with the contract, all sell their interests to one party, and he tenders the amount necessary to entitle him to enforce such contracts, the matter in dispute, as regards his right to appeal, is the amount so tendered, even though his separate vendors would not have had the right of appeal; and the county and its officers are real parties in interest in such a suit, although it was the duty of the governor of the State to issue the patent. *Corbin* v. *Black Hawk*, 632.

I. CONTENTS OF CONTRACT UNDER SECTION 629 U. S. REVISED STATUTES.

1. The contents of a contract, in the sense of section 629 of the Revised Statutes of the United States, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. *Id.*

2. Hence, where a county commissioner sells different pieces of land to different parties, who sell and convey their interests to one party, and he tenders the amount necessary for the enforcement of the contracts, the Federal Circuit Court has no jurisdiction of a suit brought by him to enforce such contracts, unless his assignors might also have sued in it. *Id.*

II. POWER TO ADOPT PROCEEDINGS FOR DISCOVERY UNDER SECTION 916 U. S. REVISED STATUTES.

1. The proceeding in aid of execution in its present form in New York, allowing a judgment debtor to be summoned before a referee and required to disclose his property, is a statutory process, much more extensive than the power of the court of chancery as administered independent of statute. *Ex parte Boyd*, 750.

2. But even though the proceeding may have had historically its origin in the chancery courts, yet being only an auxiliary remedy for discovery merely, and being merely in aid of the legal right, it ceased as soon as the common-law courts became armed with adequate powers to execute their own process, and could be conferred on common-law courts as a part of their own process, and became a common-law remedy concurrent with the ancient equitable remedy. *Id.*

3. Hence it may constitutionally be adopted by the Federal courts under section 916 of the United States Revised Statutes, as a part o their procedure. *Id.*

IV. APPEALS FROM WYOMING SUPREME COURT.

Under sections 702 and 1909 of the Revised Statutes of the Unitec States the amount required to appeal from the Supreme Court o Wyoming to this court is one thousand dollars, and that also in case where the United States are appellants. *United States* v. *Railroa Co.*, 303.

V. HOW FAR FOLLOW STATE DECISIONS.

1. It is the duty of the Federal courts in all cases within their juris diction depending on local law to administer that law, so far as i affects contract obligations and rights, as it was judicially expounde at the time such obligations were incurred or such rights accrued ; an they do not feel bound to follow later decisions of the State court modifying the rule previously expounded by them, in respect to con tracts made on the faith of the law as first expounded. *Taylor* v *Ypsilanti*, 326.

2. A decision of the court of last resort in a State as to when a cer tain section of the State Constitution, relating to municipal subscrip tions to railroads or private corporations, took effect, which had beer assumed as correct in several decisions of this court, followed by thi court. *Wade* v. *Walnut*, 398.

VI. HOW REQUISITE CITIZENSHIP MUST APPEAR.

The citizenship which would oust the jurisdiction of the Federa courts must be made to appear of record, and it will not be presume that a party who might defeat the jurisdiction was a citizen at the in stitution of the suit merely because he was such at the time of th transaction out of which the suit arose. *Mining and Manufacturin Co.* v. *Bradley*, 384.

VII. WHEN DISTRICT JUDGE CANNOT VOTE IN CIRCUIT COURT.

At the hearing in the Circuit Court of an appeal from the Distric Court, the district judge who rendered the judgment appealed fron cannot, under section 614 of the Revised Statutes, give a vote, ever by consent of parties, when another judge is present ; and the cas cannot be brought to this court upon a certificate of division of opin ion between him and the other judge. *United States* v. *Emholt*, 452

VIII. MODE OF REVIEWING INFORMATION FOR FORFEITURE.

An information for a forfeiture under the internal revenue law cannot be brought from the Circuit Court to this court by appeal *Id.*

IX. See *Error and Appeal; Admiralty.*

COURTS-MARTIAL.

1. Under the sixty-second article of war a court-martial, even i times of peace, has jurisdiction to try a soldier for an assault wit

intent to kill a prisoner confined in a jail over which he was at the time standing guard, such a crime being clearly to the prejudice of good order and military discipline. *Ex parte Mason*, 820.

2. The fifty-eighth and fifty-ninth articles of war do not apply to such a case, it being in time of peace, and the application for the surrender of the offender to the civil authorities, mentioned in the fifty-ninth article, not having been made. *Id.*

3. The ninety-seventh article of war merely prohibits the court from sentencing to imprisonment in the penitentiary in cases where, if the trial had been for the same act in the civil courts, that could not be done, but does not prohibit a court-martial from punishing "conduct to the prejudice of good order and military discipline" by confinement in the penitentiary, nor from superadding the punishment of forfeiture of pay and dishonorable discharge. *Id.*

CRIMES.

I. INTOXICATION IN MITIGATION.

Under a statute establishing degrees of the crime of murder, and providing that willful, deliberate, malicious, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation. *Hopt* v. *Utah Territory*, 115.

II. INDICTMENTS FOR COUNTERFEITING.

An indictment on section 5431 of the Revised Statutes, alleging, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely-made, forged, counterfeited and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited, and altered, is insufficient, even after verdict. *United States* v. *Carll*, 611.

III. See *Courts-Martial.*

CROSS-APPEALS.

See *Admiralty.*

CUSTOMS AND DUTIES.

ON TORCHON LACES.

Torchon laces are subject to the duty of thirty per cent. imposed on "thread lace and insertings," and not to that of forty per cent. imposed on manufactures of flax, or of which flax is the component material of chief value "not otherwise provided for." *Smith* v. *Field*, 317.

DAMAGES.

See *Admiralty; Equity; Patents; Contracts; Sale.*

DESCENTS.

See *Aliens.*

DISCOVERY.

See *Courts of the United States.*

EQUITY.

I. JURISDICTION ON GROUND OF AVOIDING MULTIPLICITY OF SUITS.

Where a statute makes the stockholders of a corporation jointly and severally liable for its debts under certain circumstances, a court of equity, having acquired jurisdiction to enforce the lien of a debt due by the corporation, may, in the same proceeding, to avoid multiplicity of suits, enforce the individual liability of the stockholders. *Mining and Manufacturing Co.* v. *Bradley*, 384.

II. INJUNCTIONS.

1. A court of equity has, as an inherent power independent of statute, the right to impose terms or require security for damages from the party applying for an injunction; and this power is inherent in the Federal Circuit Courts, as courts of chancery, independent of statute. *Russell* v. *Farley*, 410.

2. And having the power of imposing terms, it has also the power to mitigate them or relieve from them. *Id.*

3. *It seems* that the chancery court which awarded the injunction has the inherent power, on deciding against the complainant, to proceed in the same suit to assess the damages arising from the injunction, and will not leave the parties to an action at law on the injunction bond. *Id.*

4. The decision of the inferior court on the amount of damages sustained by an injunction suit is so much a matter of discretion that it will require a very clear case for this court to reverse it. *Id.*

III. FAILURE OF JURISDICTION AFTER PROOFS TAKEN.

1. Where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which, it turns out, cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law. *Mitchell* v. *Dowell*, 763.

2. Hence, where a suit in chancery was instituted to foreclose a mortgage securing certain notes, and the mortgage turns out on the proofs to be void, the court has no jurisdiction to give a personal decree on the notes, and should dismiss the bill without prejudice. *Id.*

IV. See *Contracts; Courts of the United States; Patents; Grants.*

ERROR AND APPEAL.

I. ALLOWANCE OF APPEAL.

The acceptance of security and signing of a citation by the circuit judge is in legal effect the allowance of an appeal, and no formal order of allowance is necessary. *Brandies* v. *Cochrane*, 223.

II. APPEALS FROM TERRITORIAL COURTS.

The act of Congress of April 7, 1874, in relation to appellate proceedings from territorial courts, *held* to require all cases in which there is not a trial by jury to be brought to this court by appeal, and not by writ of error; and *held* to apply to all territorial courts, and not merely to those where the distinction between suits at law and in equity had been abolished. *Hecht* v. *Boughton*, 301; *U. S.* v. *Railroad Co.*, 303; *Bonnifield* v. *Price*, 357; *Upton* v. *Mason*, 478; *Upton* v. *Steele*, 479.

III. STATEMENT OF FACTS.

1. In cases of trials not by jury a statement of facts is necessary to enable this court to review the decision of the lower court. *Bonnifield* v. *Price*, 357.

2. Where equitable jurisdiction is conferred in a special case by a special act, no statement of facts on appeal is necessary, section 707 of the Revised Statutes of the United States not applying to such cases. *Harvey* v. *United States*, 699.

IV. HOW JURISDICTION OF LOWER COURT DIVESTED.

After the acceptance of the bond required by the judge of the lower court in awarding a supersedeas, the jurisdiction of the lower court ceased and of this court vested, and the lower court had no jurisdiction to make an order requiring additional security, and, in default thereof, vacating the former allowance of an appeal. *Keyser* v. *Farr*, 358.

V. FINAL JUDGMENTS.

1. The judgment of the Court of Errors and Appeals of New Jersey affirming the judgment of the lower court and remitting the record to the inferior court is the final judgment in the case, and not the order of the inferior court receiving and filing the remittitur; and a writ of error to operate as a supersedeas should have been within sixty days from such judgment. *Iron Co.* v. *Hoagland*, 729.

2. A record of a case simply showing a verdict and motion for new trial overruled, but no judgment on the verdict, shows no such final judgment as is reviewable. *Insurance Co.* v. *Scheffer*, 541.

VI. INSTRUCTIONS TO JURY.

1. It is not error in a court to instruct a jury to find a certain verdict if it is satisfied that, conceding all the inferences which a jury might draw from the testimony, the evidence would not be sufficient to support a contrary verdict. *Stewart* v. *Lansing*, 85.

2. Under a statute which requires the instructions of the judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine. *Hopt* v. *Utah Territory*, 115.

VII. APPEAL BONDS.

1. In a proceeding for an order of seizure and sale to foreclose a mortgage for the unpaid purchase-money of a plantation, in which the mortgagor appeals from the decision granting such order, a bond with security conditioned "that the appellant * * * shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of sale of his estate; * * * otherwise that the surety shall be bound in his stead," is a bond taken under articles 575 and 579 of the Louisiana Code of Practice; and the surety on such bond is liable for the debt whose enforcement is thus suspended, and not merely for damages from delay, costs, and interest. *Marchand* v. *Frellsen*, 431.

2. The satisfaction of a decree on an appeal bond given in one court to suspend the collection of one instalment of the unpaid purchase-money is no satisfaction of an appeal bond given in another court to suspend the collection of another instalment. *Id.*

3. The foreclosure of a mortgage and application of the proceeds of sale to the payment *pro rata* of the instalments, to suspend the enforcement of which the appeal bond was given, is not such an act of the creditor as discharges the surety under section 3061 of the Louisiana Code of 1870. *Id.*

VIII. STATEMENT OF A CASE.

A "statement" of the case, according to the law regulating civil proceedings in the Territory of Arizona, takes the place of a bill of exceptions when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken; and though prepared for and used on a motion for a new trial, it is available on appeal from the judgment, when, by stipulation of the parties, it is made a part of the record for that purpose. *Head* v. *Hargrave*, 440.

IX. See *Admiralty; Courts of the United States; Costs.*

EVIDENCE.

I. TREASURY TRANSCRIPTS.

1. A treasury transcript containing an account of the United States with a tax collector under the internal revenue act, in which are included collections of assessments made under a former term of office, is *prima-facie* evidence of the fact of indebtedness which it certifies, in a suit on his bond for a succeeding term; there being nothing to show that during his succeeding term he had not collected assessments so made during the preceding term. *United States* v. *Hunt*, 376.

2. But even if collected during the preceding term, this was not sufficient to exclude entirely such a transcript containing charges admittedly collected during the succeeding term. *Id.*

II. RECEIPTS OF TAX COLLECTOR.

Receipts of the collector are admissible in evidence against him, and being part of his official transactions, are originals, even though they

are summaries or abstracts of alphabetical lists containing in detail the persons and amounts assessed. *Id.*

III. IN ACTIONS FOR LEGAL SERVICES.

In an action for legal services the opinions of attorneys as to their value are not to preclude the jury from exercising their "own knowledge and ideas" on the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of witnesses is not, as a matter of law, to be accepted by the jury in the place of their own. *Head* v. *Hargrave*, 440.

EXECUTIONS.

I. REMEDY FOR ILLEGAL LEVY.

Although in general the proper remedy for a wrongful levy on property not subject to the levy is a motion to discharge the levy, yet where equity has jurisdiction on the ground of a trust, the same bill may invoke the restraining power of the court to prevent a sale under the levy. *New Orleans* v. *Morris*, 802.

II. CITY WATER-WORKS.

The water-works of a city are of such public utility and necessity that they are exempt from sale for the debts of the city. *Id.*

III. See *Courts of the United States.*

FRAUDULENT CONVEYANCES.

1. A mortgage executed by an insolvent mortgagor and covering his entire estate, to his creditor, who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, conceals the mortgage and withholds it from the record, and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he cannot pay, is void at common law. *Blennerhassett* v. *Sherman*, 571.

2. See *Bankruptcy.*

GRANTS.

The State of Indiana, after the original construction of the Wabash and Erie Canal, passed an act authorizing the engineer of the canal to let out a contract to so clear and improve the canal as to make surplus water-power available, and pledging to the contractors all the rents received from the lease of such water-power till they were paid; and certain contractors undertook and completed the work. Some leases were made, and the rents paid over to the contractors. Later, the State granted to a mill-owner on the St. Joseph River, whose mill had been almost deprived of water by tapping the river for the canal above his mill, and who was claiming damages from the State, the right

to draw off from the canal a certain amount of water for a mill free of rent, which he accepted, released his claim for damages, and proceeded to make costly improvements. Subsequent to this the State issued certificates of indebtedness to fund a portion of the original cost of constructing the canal, and granted all its interest in the canal to trustees in pledge to secure these certificates, subject to all existing rights and equities against the State on account of the same. A chancery suit was brought by a holder of one of these certificates against the trustees alone as defendants, in which the canal was sold free of incumbrances and the proceeds paid into court. Petitions being filed by these lessees and contractors asking to be made parties, and to be allowed to share in the proceeds, which were dismissed by the lower court on demurrer: *Held*—

1. That the effect of the agreement with the contractors was to convey to them a property-right in the rents produced by leasing the water-power, and to make the State a trustee to collect and pay over the rents as fast as collected until the contractors were paid, and that it operated as a complete transfer in equity.

2. That the agreement to permit the mill-owner to draw water from the canal was in effect an absolute grant for a valuable consideration of the right, and that it was a property-right, and the legitimate subject of a grant.

3. That the trustees merely obtained the State's interest, subject to all prior incumbrances, and hence that the rights of the contractors and mill-owner were superior to those of the trustees, or of those claiming under a judicial sale of their interest.

4. That the contractors, mill-owner, and other lessees, while not necessary, would have been proper parties, and were entitled to intervene by petition, and submit to adjudication their rights against the proceeds of sale as the representative of the *res* itself. *French* v. *Gapen*, 120.

HUSBAND AND WIFE.

SEPARATION OF PROPERTY OF IN LOUISIANA.

1. The failure to advertise the separation of the property of husband and wife, as required by article 2429 of the Louisiana Civil Code, does not render the judgment of separation void. *Carite* v. *Trahot*, 782.

2. The requirement that the judgment of separation shall be executed, imposed by section 2428 of the Louisiana Civil Code, applies only to cases where the judgment requires the transfer of property or payment of money, and not to cases where the object is merely to protect future earnings of the wife from the husband's debts, and the only money decree is for costs; in which latter cases the exercise of the right is the only execution required. *Id.*

3. The mere allegation of the embarrassed condition of the husband, or of his insolvency, is sufficient to support such a decree of

separation of property under section 2425 of the Louisiana Civil Code. *Id.*

4. The fact that the husband consented to the fixing and trial of the case does not avoid the decree of separation. *Id.*

5. The fact that the suit involved no money claim did not deprive the Parish Court of jurisdiction. *Id.*

INJUNCTIONS.

See *Equity.*

INSTRUCTIONS TO JURY.

See *Error and Appeal.*

INSURANCE.

I. ON LIFE OF ANOTHER, HOW FAR VALID.

1. An insurable interest in the life of another is such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. *Warnock* v. *Davis*, 93.

2. An insurance policy on the life of another by one not having such an interest, is a wager policy and void. *Id.*

3. An assignment of a policy to a party not having an insurable interest, whether of the whole or a portion merely of the insurance-money, is valid only to the extent of loans or advances made on account of it, or the premiums paid on its security; but as far as it attempts to assign any surplus, is as void as a direct insurance would be, and is equally objectionable as a wager policy. *Id.*

4. If under color of such assignment the assignee collects the money due on such a policy, the assignor or his representatives may recover the amount so collected, less any loans or advances, and the rule of *par delictum* does not apply to such a case. *Id.*

II. WAIVER OF FORFEITURE.

1. Waivers of stipulations in agreements, and ratifications of previous unauthorized acts of an agent by a principal, must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. *Bennecke* v. *Insurance Co.*, 164.

2. Hence, where a party insured went south of a forbidden latitude and died, and the agent of the company, hearing of his departure, went, after his death, but whilst ignorant of it, to a relation of the insured, and persuaded him to apply and pay for a permit, and gave him a receipt therefor, and forwarded the money to the principal office of the company, and requested a permit, which was never received, and, eleven days after hearing of the death of the insured, tendered back the premium, *held* that these facts did not constitute a waiver of the forfeiture by the company. *Id.*

III. INTEMPERANCE AS AFFECTING.

1. An instruction that "where in a question whether the insured is of temperate habits at the time when he seeks to be insured, witnesses testify from their own knowledge of the party and his habits that he was not temperate, their testimony is entitled to greater weight than those who testify otherwise, because the latter have not seen or known of such habits as are testified to by the former," is improper, (*a*) because it assumes that there was a difference in the sources of knowledge of the witnesses, which is a fact not proved; (*b*) because in a question of such character it depends on their respective opportunities for judging whether the knowledge of the one is more to be trusted than the opinion of the other; (*c*) because it omits the consideration of the character of the witnesses. *Insurance Co.* v. *Foley*, 426.

2. A representation that a party is of temperate habits is not untrue if his habits in the usual every-day routine of his life are temperate, even though it is proved that he had had an attack of *delirium tremens*, for that may have resulted from a single debauch. *Id.*

INTERNAL IMPROVEMENTS.

See *Constitutional Law.*

INTERNAL REVENUE.

1. It being entirely clear from the internal revenue laws that manufacturers of friction matches are entitled to a commission of ten per centum on the whole amount of stamps purchased by them, when furnishing their own dies, a uniform practice of the department to allow ten per centum in stamps at their face value, and only on the amount of money paid by purchasers, is not binding, unless it is proved to have been acquiesced in or agreed to; and a long-running account between the department and certain purchasers, treated by both not as an aggregation of separate items, but as a running account, is not sufficient proof of such acquiescence. *Swift, &c., Co.* v. *United States*, 503.

2. While there may be cases in which an assessment made by the Commissioner of Internal Revenue must stand as an entirety or not at all, *e. g.*, where an erroneous rate has been adopted by the officer, or where its validity depends upon his jurisdiction, yet, where the question is as to the quantity of spirits produced on which taxes were not paid, every material fact on which the assessment was made is open to proof, and it will stand to the extent in which it is not impaired. *United States* v. *Rindskopf*, 652.

3. The tax on snuff is thirty-two cents per pound. Granulated tobacco, whatever it may be, was not snuff within the meaning of the statute. *Venable* v. *Richards*, 688.

INTOXICATION.

See *Crimes.*

JUDGMENTS.

See *Error and Appeal.*

JURISDICTION.

1. Where the subject-matter of the proceedings and the parties are before a court which is proceeding to foreclose a mortgage for default in the payment of some of the instalments, it has jurisdiction, even though at the time a suit is pending in another court on some former instalment; and its acts cannot be collaterally attacked. *Marchand* v. *Frellsen*, 431.

2. See *Courts of the United States.*

LAND GRANTS AND PUBLIC LANDS.

EVIDENCE OF TITLE.

1. The inference in favor of any claim of right to public lands against the United States growing out of mere possession is of but little weight. *Simmons* v. *Ogle*, 479.

2. The absence both of a patent and of a certificate of entry renders very weak a claim to public lands established merely by the application on file in the land office and the entry of the terms of sale, &c., on the books of the land office. *Id.*

3. A prior claim to a piece of public land patented held on the facts not to be substantiated, especially against a patentee with a patent accompanied by possession. *Id.*

LIMITATIONS.

I. WHEN AND HOW DEFENSE OF RAISED.

1. It is too late to raise the point that the action is barred by a statute of limitation for the first time in an appellate court. *Upton* v. *McLaughlin*, 721.

2. Although, under the Code of Civil Procedure of Wyoming Territory, the defense of the statute of limitation may be raised by special demurrer where the petition shows on its face the necessary facts, yet such a defense must be made in the court of original jurisdiction, before judgment, and cannot be made for the first time in the appellate court; and the record must show that the question was distinctly raised in the lower court. *Id.*

II. TO ACTIONS IN COURT OF CLAIMS.

The limitation of six years imposed by section 1069 of the Revised Statutes of the United States on bringing suits in the Court of Claims applies to an action brought by a paymaster in the army to establish a right to relief for money stolen from him, where it appears that he had paid up the money and that the government had always refused to allow his claim; such a case being materially different from that of United States *v.* Clark, 96 U. S., 37. *United States* v. *Smith*, 808.

III. See *Bankruptcy; Constitutional Law; Corporations; Corporation Securities.*

LIMITED LIABILITY ACT.

I. TO WHOM APPLIES.

1. The limited liability act of 1851, reproduced in the Revised Statutes in sections 4282, &c., applies to owners of foreign as well as domestic vessels, and to acts done on the high seas as well as in waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or, perhaps, of two foreign nations having the same maritime law. *Steam Navigation Co.* v. *Dyer*, 277.

2. The maritime law of the United States, as found in the statute, is the same as the general maritime law of Europe, and is different from that of Great Britain in this: that the former gauges the liability by the value of the ship and freight after the loss or injury, and the latter by their value before the loss or injury, not exceeding £15 per ton. *Id.*

II. HOW DEFENSE UNDER MADE.

1. Ship-owners may avail themselves of the defense of limited responsibility by answer or plea as well as by the form of proceeding prescribed by the rules of this court, at least so far as to obtain protection against the libelants or plaintiffs in the suit. Those rules were not intended to restrict them, but to aid them in bringing into concourse those having claims against them arising from the acts of the master or crew. *Id.*

2. If the owners plead the statute, a decree may be made requiring them to pay into court the limited amount for which they are liable, and distributing the said amount *pro rata* amongst the parties claiming damages. Such a proceeding in a court of admiralty would be an "appropriate proceeding" under the statute. *Id.*

3. It is not necessary that ship-owners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if found in or confessing fault, may abide a decree against them for the value of ship and freight as found by the proofs. *Id.*

III. OWNER MAY CLAIM BENEFIT OF BEFORE SUIT INSTITUTED.

Notwithstanding Admiralty Rules Nos. 54–57, the owner of a vessel may institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability provided by sections 4284 and 4285 of the Revised Statutes of the United States, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises. *Ex parte Slayton*, 407.

IV. WHAT COURT HAS JURISDICTION.

1. A District Court in admiralty at the port whither the vessel when lost was bound, which had appointed a trustee, to whom the owner conveyed all his interest in the remnants of the vessel and paid the freight-money, thereby acquires jurisdiction to entertain the

proceeding for limitation of liability, even though the wreck may not be in the district. *Id.*

2. The District Court having acquired jurisdiction, has the right to decide what persons are entitled to share in the fund, and this court will not, on a writ of prohibition, indicate to it the parties to whom to distribute the fund. *Id.*

MANDAMUS.

See *Corporation Securities; Constitutional Law; Removal of Causes.*

MATTER IN DISPUTE.

See *Courts of the United States.*

MORTGAGE.

REDEMPTION.

1. A bill of review which prayed to have so much of a decree set aside as denied the statutory right of redemption given by the State law in cases of foreclosure of a mortgage, *dismissed*, it appearing that the party wishing to redeem did not make the offer to redeem in the time required by the statute, and the court holding that he could not make such offer after such time had expired, and that therefore it could serve no good purpose to set aside such decree, even if erroneous. *Burley* v. *Flint*, 270.

2. The statutes of Illinois giving the right to redeem mortgaged lands sold under decree, do not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty, and franchises so mortgaged should be sold as an entirety, and without the right of redemption given by statute. *Hammock* v. *Farmers' Loan and Trust Co.*, 613.

3. The chattel-mortgage statute is inapplicable to an ordinary railway mortgage. *Id.*

JUNIOR INCUMBRANCES.

1. A seizure and sale by virtue of executory process under a mortgage, according to Louisiana practice, is not affected by the existence of subsequent mortgages the owners of which are not made parties, but vests the title in the purchaser at such sale, extinguishing the lien of the other mortgages and transferring it to the proceeds of sale. *Carite* v. *Trotot*, 782.

2. An agreement by a mortgagee in advance of a sale to resell the property, in the event of his becoming the purchaser, to the wife of the mortgagor for an amount sufficient to pay the mortgage debt and costs, is not a fraud or injury to the other creditors of the mortgagor. *Id.*

3. A decree in a chancery suit allowing a junior incumbrancer to redeem real estate which had been sold at a trust sale on condition that he would pay off an incumbrance prior to his own, and also refund to such

incumbrancer the amount of an incumbrance prior to both, and the taxes and insurance on the property, which had been paid by such incumbrancer, gave him all the rights to which he was entitled, and was correct. *McCormick* v. *Knox*. 107.

III. See *Bankruptcy; Fraudulent Conveyances; Railroad Mortgages.*

NATIONAL BANKS.

TAXATION OF SHARES.

1. The act of 1866 of the New York Legislature imposing a tax on bank shares, but not allowing the shareholder to deduct from his shares the amount of his debts, as was allowed the owner of all other personal property by the act of 1850, is to that extent, in so far as it applies to stockholders of national banks, in conflict with the national banking act, and unconstitutional. *Supervisors* v. *Stanley*, 543.

2. It is not, however, absolutely void, but is void as against the act of Congress only in cases where some one was injured by the particular matter in conflict. Those portions of it which are valid are separable from those which are invalid. Even as regards national bank stock, it is valid as to holders who owe no debts, and only voidable as to those who are indebted, and stands as against them until, by taking the steps required by the State law, they prove themselves entitled to the reduction. *Id.*

3. Hence the case at bar was reversed and remanded, with permission to the inferior court in its discretion to allow amendments and to hear evidence tending to prove a practice of the tax assessors to assess national bank stock higher than other moneyed property. *Id.*

4. Supervisors of Albany County *v.* Stanley, *ante*, p. 543, followed. *Hills* v. *National Bank*, 559.

5. A party who makes affidavit under the act of New York of 1850 that the value of personal estate owned by him is only slightly in excess of his debts, and demands of the tax assessors that the debts due by him be deducted from the valuation placed on his national bank stock, is, on their refusal, entitled to an injunction restraining them from collecting the illegal excess in his taxes caused by the improper valuation of his bank stock. *Id.*

6. And where the fact is clearly established from the general course of dealing of the assessors that such affidavit and demand would have been unavailing, the necessity of making it is dispensed with. *Id.*

7. On the principles announced in the two preceding cases, the taxation of national bank shares by the Indiana revenue laws, without permitting the shareholder to deduct from their assessed value the amount of his *bona-fide* indebtedness, as is allowed in the case of other investments of moneyed capital, is a discrimination against the act of Congress; and the collection of the illegal excess may be enjoined by those who prove that they owe debts which they are entitled to have deducted. *National Bank* v. *Britton*, 563.

NAVY OF THE UNITED STATES.

VHEN MILEAGE ALLOWED OFFICERS OF.

Officers of the navy, while traveling under orders, engaged in public business, are, under the act of June 30, 1876, entitled to mileage for the distance traveled both by land and sea, and the alleged practice of the accounting officer of the Treasury to allow only actual expenses for travel by sea and mileage only for travel by land, is wholly without warrant. *United States* v. *Temple*, 212.

NEGLIGENCE.

. REMOTE AND PROXIMATE CAUSE.

A party is injured in a railroad accident, his injury brings on insanity, and about eight months after this accident he commits suicide in a fit of insanity. Under a State statute giving to the personal representative of the deceased a right of action for death caused by negligence or default, the accident is too remote a cause of the death to be actionable. *Scheffer* v. *Railroad Co.*, 464.

[. See *Corporations.*

NEGOTIABLE INSTRUMENTS.

1. A purchaser from a *bona-fide* holder of negotiable paper succeeds to his rights. *New Buffalo* v. *Iron Co.*, 353.

2. See *Corporation Securities.*

OPINIONS.

VHEN NOT ACTIONABLE.

1. Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value is more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance on it may produce. *Gordon* v. *Butler*, 693.

2. Hence a written certificate as to the value of land supposed to contain a mine of sandstone, by which a party was induced to lend a sum of money on it as security, and which greatly exceeded the value of the land, when sold to satisfy the debt, is not actionable. *Id.*

PARTIES.

See *Error and Appeal; Grants.*

PATENTS.

WHEN CONSTRUCTION FOR COURT.

If it appears from the face of original and reissued patents that extrinsic evidence is not needed to explain terms of art, nor to apply the descriptions to the subject-matter, so that the court is able to say from mere comparison what are the inventions described in each, then the

question of identity is one of pure construction by the court and not of fact for a jury. *Heald* v. *Rice*, 50.

II. REISSUES.

1. The patent granted June 22, 1858, to Gideon Bantz construed to be for a combination of several devices, and his reissue granted February 6, 1872, construed to claim each device separately, and hence to be void as being too broad. *Bantz* v. *Frantz*, 341.

2. But, even if valid, the laches of waiting for nearly fourteen years before applying for a reissue is fatal to it. *Id.*

3. An original patent claimed for a combination between a hydrant and a casing or jacket around it, but not attached to it, and resting on a flange projecting from the induction pipe, the purpose being to prevent the action of frost on the hydrant; and the reissue claimed these elements separately and not as a combination: *Held*, That the reissued patent was void as enlarging the scope of the original, and also as being for a substantially different invention. *Matthews* v. *Machine Co.*, 347.

4. The reissue on April 16, 1872, of the original patent of May 19, 1857, of Asa Johnson for an improved method of fastening sheet metal on roofs, is broader than the original patent, and therefore void. *Johnson* v. *Railroad Co.*, 931.

5. The original patent No. 146,614, dated January 20, 1874, issued to H. W. Rice, *construed* to be for a return-flue boiler, including new and useful improvements in steam boilers, in which the mode of supplying straw to the grate is merely incidental; and his reissued patent No. 6,422, granted May 4, 1875, *construed* to be for a particular mode of using such boiler, with straw as a fuel, by means of an attachment to the furnace-door for the purpose; and hence his reissued patent is void as being for a different invention from that contained in the original—the one being for a machine, the other for a process. *Heald* v. *Rice*, 50.

6. And the reissued patent is anticipated by patents issued to David Morey, which cover a combination of the furnace of a threshing engine with a detachable box or tube provided with a flaring mouth for the purpose of feeding with straw; for these patents cover the attachment of such an arrangement to any boiler, and the mere discovery by another party that it works better on one kind of boiler than on another is not patentable. *Id.*

III. COMBINATION OF FORMER INVENTIONS.

Nor is the mere combination by a third party of the patent of one man with the patent of another, each operating separately and producing its own results, patentable. *Id.*

IV. MEASURE OF DAMAGES FOR USE OF.

1. A party who purchases from their owner two paper-bag machines of the Morgan patent, under a contract by which the vendor agrees to furnish as many of that kind as the vendee wishes, for a stipulated

royalty, and who accepts a machine of the Rice patent sold him by the same vendee in lieu of an additional one of the Morgan patent which he had called for, and continues to use these machines after the Rice patent had been extended and had been assigned to others, is liable to that assignee only for the royalty which he had agreed to pay to his vendee, inasmuch as his vendee had the right to sell the use of the machine for the extended term also, and is not liable for the profits derived from the use of the machine. *Paper-bag Machine Co.* v. *Nixon*, 73.

2. Inasmuch as such purchaser held the right to use the machines in question by a license older and superior to the assignment, neither the assignee nor licensees claiming under the assignee can recover any damages against such purchaser, but can only recover the royalty which he had agreed to pay. *Id.*

3. In a patent case where an infringement was proved, it appearing that there was only a limited market for the invention infringed, (which was a pump for drawing gas from oil wells and conducting it to the furnace of the engine,) and that every article sold by the parties infringing drove out and took the place of one which otherwise would have been sold by the patentees, the true rule of damages is the difference between the price at which the article infringing the patent was sold and the actual cost of making it, multiplied by the number sold. *Manufacturing Co.* v. *Cowing*, 215.

V. INFRINGEMENT.

1. The patent granted to Lehnbeuter and Claes, No. 8,814, dated November 30, 1875, for a certain kind of show-case, *held* on the evidence to have been infringed by defendants. *Lehnbeuter* v. *Holthaus*, 112.

2. As against a party proved to have infringed, a patent is *prima-facie* evidence of both novelty and utility. *Id.*

VI. SUBJECT TO PATENTEE'S DEBTS.

A patent right may be subjected by bill in equity to the payment of a judgment debt of the patentee. *Ager* v. *Murray*, 173.

VII. GROUNDS OF EQUITABLE JURISDICTION IN SUITS FOR DAMAGES FOR INFRINGEMENT.

The court, after reviewing the decisions on the rule of damages for infringements of patents and the various cases in England and America on the subject of the chancery jurisdiction as founded on the want of a complete remedy at law, decides:

1. That a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained:

2. That such relief ordinarily is incident to some other equity, the right to enforce which secures to the patentee his standing in court:

3. That the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement:

4. That grounds of equitable jurisdiction may, however, arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his legal remedy difficult, inadequate, and incomplete; which latter cases must each rest upon its own particular circumstances as furnishing a clear ground of exception from the general rule:

5. That the rule holding an infringer a trustee for the patentee is a mere rule of administration, in cases where the jurisdiction to grant equitable relief is clear on other grounds, and does not confer equitable jurisdiction as creating a trust. *Root* v. *Railroad Co.*, 240.

VIII. WANT OF NOVELTY OR PATENTABILITY.

1. Where the process of packing cooked meats had long been known, the mere change of the mode of cooking to one not before used is not patentable. *Packing Company Cases*, 738.

2. The Wilson reissued patent No. 6,370 for canning cooked meats, *construed* not to cover in its claim and specifications the Appert process, nor the process of cooking the meat to be canned by plunging it into water already heated to the boiling point; and the patent is void because all the elements included in it are old. *Id.*

3. Reissued letters-patent No. 7,928 to John A. Wilson, for improvements in metallic cans for containing cooked meats, *held*, on the facts, to be void for want of novelty. *Id.*

4. It appearing from the evidence that automatic devices for raising shelves attached to stove-doors and closing them, and for producing simultaneous operations according to the wants of the case, have long been known, Bussey's patent No. 180,001 for an automatic device of that character, if valid at all, is only valid for that special device, and is not infringed by patents which accomplish the same purpose with a different device. *Bridge* v. *Manufacturing Co.*, 798.

IX. DEFINITENESS OF SPECIFICATION.

A specification in letters-patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which the invention belongs. *Loom Co.* v. *Higgins*, 845.

X. TERMS OF ART.

Evidence is admissible to show the meaning of terms used in a patent, as well as the state of the art, for the purpose of enabling the court, or jury, to understand it. *Id.*

XI. IMPROVEMENTS.

1. If an improvement of a well-known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine; the patent

is to be read as if the machine and its appendage were present, or in the mind of the reader, and he a person skilled in the art. *Id.*

2. *Query:* Whether the defense of insufficient description can be set up without alleging an intent to deceive the public? *Id.*

3. A new combination of known devices, producing a new and useful result, (as that of greatly increasing the effectiveness of a machine,) is evidence of invention, and may be the subject of a patent. *Id.*

4. Webster's improvement in looms for weaving pile fabrics, which consisted in such a new combination of known devices as to give to a loom the capacity of weaving fifty yards of carpet a day, when before it could only weave forty, *held* to be patentable, and his patent for the same, dated August 27, 1872, sustained. *Id.*

XII. PRIORITY BETWEEN TWO ORIGINAL INVENTORS.

1. Of two original inventors, the first will be entitled to a patent unless the other puts the invention into public use more than two years before the application for a patent. *Id.*

2. An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it. *Id.*

3. Though the defense of prior invention ought to be set out in the answer, yet if the omission to set it out is not objected to at the proper time in the court below, it cannot be objected to in this court. *Id.*

XIII. LICENSE—BURDEN OF PROOF.

Where a license is in the possession of the party claiming under it, and is absolute and unconditional on its face, the burden of proof is on the licensor when he asserts that it was delivered as an escrow. *Mellon* v. *Railroad Co.*, 382.

XIV. IN GENERAL.

1. The patent to Race and Matthews, dated November 16, 1869, claiming for an improvement in hydrants, which merely covered a jacket slipping over it like a sleeve and having room to play to protect it from cold, *held* void as being too general, and covering things in use before the date of the patent. *Matthews* v. *Machine Co.*, 347.

2. The defendant held, on the facts, not to have infringed the valve apparatus covered by the same patent. *Id.*

3. Guidet's reissued patent No. 4106, dated August 23, 1870, claiming as his patent the use of stone blocks for paving in the form of parallelopipeds with rough side surfaces, but without saying how rough, is void, it being proved that blocks of that character had been in use before his patent, and his patent merely being an improvement in the amount of roughness to be used, and not being patentable. *Guidet* v. *Brooklyn*, 511.

4. It appears from the evidence that the use of slotted plates and bolts to allow for the effect of changes of temperature was known prior to the original patent. *Johnson* v. *Railroad Co.*, 931.

PLEADING.

I. WHAT AVERMENT SUFFICIENT.

In a chancery suit by a wharf-owner to enjoin the driving of piles and construction of a run-way out into a river, the allegation that "the effect of driving the piles in the bed of the river and constructing the run-way will be to divert the river from its natural course and throw it east of its natural location, and from the river bank north and south of said run-way and piling, and create in front of and upon plaintiff's improved wharf a deposit of mud and sediment, so that it will be impossible to land at plaintiff's wharf," is not a mere expression of opinion or apprehension, but a sufficiently certain and minute allegation of facts, and is not demurrable. *St. Louis* v. *Knapp, Stout & Co.*, 37.

II. See *Corporation Securities.*

PRACTICE.

REINSTATEMENT OF CAUSES.

Motion to reinstate a cause *denied*, appellant giving no good reason for his default. *James* v. *McCormack*, 393.

RAILROADS.

See *Constitutional Law.*

RAILROAD MORTGAGES.

FORECLOSURE FOR DEFAULT OF INTEREST.

1. In a railroad mortgage which is declared to be for the purpose of securing the payment of the interest as well as the principal of certain bonds, and where the mortgagor's right of possession terminates upon a default in payment of the interest as well as principal on any of the bonds, the trustees in the mortgage or any bondholder, on non-payment of any interest, may file a bill for foreclosure and sale, and will be entitled to a decree *nisi*, ascertaining the amount of interest due, and giving the debtor a reasonable time to pay it. In case of non-payment, a sale may be made and the proceeds applied to the payment of interest and also of principal; but the debtor, at any time before the sale or its confirmation, may redeem by bringing into court the amount of unpaid interest and costs. *Railroad Co.* v. *Fosdick*, 1.

2. The decree on which the sale is based must find correctly the fact, nature, and extent of the default which constitutes the breach of the condition of the mortgage, and the amount due on account thereof; and a decree which orders a sale for the non-payment of a larger amount than is actually due is fatally erroneous. *Id.*

3. Where the foundation of the trustees' right to foreclose was that a certain amount of interest should be in default, and it was shown that such default had occurred, but there was nothing in the record to show that the coupons as to which default had been made had not

been funded under certain funding agreements granting an extension, and the default so waived, and it was not even shown that the coupons held by some of the complainants had not been funded—this was not sufficient to justify a foreclosure based on such default as a necessary condition precedent. *Id.*

4. Nor is such foreclosure justified by the fact that the company, after loss of possession of its property by the foreclosure proceedings, failed to pay interest; for the steps taken as a necessary preliminary to foreclosure must stand or fall upon the circumstances existing when they were taken, and cannot be supported or validated by subsequent occurrences. *Id.*

5. A mere provision that in case of a sale for default of interest the proceeds are to be applied to the payment of principal also, does not make the principal due before the stipulated time, nor prevent the mortgagor from redeeming by the mere payment of interest. *Id.*

6. Provisions imposing penalties being strictly construed, in a paragraph of a mortgage which provides that "if default be made in the payment of any half-year's interest on any of the bonds secured, and such default continue for more than six months after demand without the consent of the holder, then the principal of all the bonds shall immediately become due, and the trustees may so declare the same and notify the debtor; and, upon the written request of the holders of a majority of the said bonds, shall proceed to collect both principal and interest,"—the latter clause *held* to render such written request a necessary condition precedent to foreclosure proceedings, and not merely to render imperative on the trustees a power claimed to have been made optional with them by the first clause. *Id.*

RECEIVERS.

A judge of a Circuit Court in Illinois cannot, in vacation, appoint a receiver of a railroad corporation. The possession of a receiver so appointed is not that of the court. *Hammock* v. *Farmers' Loan and Trust Co.*, 613.

REGISTRY ACTS.

1. Under the law of Texas the lien acquired by a creditor without notice, by a judgment and levy of execution, is superior to the unrecorded deed of a vendee; and the purchaser under such execution with notice is entitled to all the rights of the creditor. *Stevenson* v. *Railroad Co.*, 731.

2. Hence the purchaser at a sale made under judgments which had been obtained prior to the recording of a mortgage, and without notice of it, obtains a better title than the mortgagee, even though the sale was made subsequent to the recording of the mortgage and with notice of it. *Id.*

REHEARING.

It being alleged that the record on which the case at bar was decided was not complete, a rehearing was granted in order to enable the parties to bring up a complete record. *Railroad Co.* v. *Fosdick*, 928.

REMOVAL OF CAUSES.

I. CAUSE PENDING AT PASSAGE OF ACT OF 1875.

1. A suit in chancery instituted in a State court and a decree of dismissal entered previous to the removal act of March 3, 1875, in which there was an appeal to the State Supreme Court, which reversed the decree and remanded the cause with leave to parties to amend the pleadings and to take testimony and to take an account, is a pending suit within the meaning of that act, and may be removed to the appropriate Federal court. *Hewitt* v. *Phelps*, 455.

2. After such a decree of the State Supreme Court, the decree was not final nor conclusive, and the cause stood for a rehearing on the merits and not for the purpose of merely executing the judgment of the appellate court, and, therefore, in the meaning of the removal acts, the removal was "before the trial thereof." *Id.*

II. SECTION 643 U. S. REVISED STATUTES NOT REPEALED.

Section 643 of the Revised Statutes, providing for removal from State courts of civil suits against revenue officers, is not superseded by the act of March 3, 1875. *Venable* v. *Richards*, 688.

III. MANDAMUS CANNOT COMPEL REMANDING.

Mandamus will not lie to compel an inferior court to remand a cause after it has once overruled a motion to remand, even though the amount involved be not sufficient for an appeal. *Ex parte Hoard*, 800.

IV. SEPARABLE CONTROVERSY.

A suit to recover possession of land and damages for detention in which the real parties interested are citizens of the same State, and those defendants who are citizens of different States from the plaintiffs are liable for damages for detention only jointly with the other defendants, and liable, if at all, only in the event of the plaintiffs establishing their title against the other defendants, cannot be removed by such non-resident defendants into the Federal court under the act of March 3, 1875. *Corbin* v. *Van Brunt*, 818.

RES JUDICATA.

1. Where coupons of questioned validity have been merged into judgment and a mandamus has been issued to enforce the payment of such judgment, no defenses can be set up against the mandamus which go to the validity of such coupons, their validity being conclusively established by such judgment. *Ralls Co.* v. *Douglass*, 871.

2. Where a legislative act authorizes a county to issue coupon

bonds, the power to tax in order to pay them necessarily results therefrom, in the absence of a special limitation. *Id.*

3. A limitation of one-half of one per cent. on the power to tax "to defray the expenses of the county" is not such a special limitation. *Id.*

4. A State law purporting to repeal the power of the county to levy taxes for the payment of its bonds is void. *Id.*

5. The defense that the bonds were not actually delivered till after the statute requiring registration went into effect cannot be set up after judgment and against the mandamus. *Id.*

6. A compromise of a pending suit, under Louisiana law, has, between the interested parties, the force of a thing adjudged, and cannot be attacked collaterally. *Oglesby* v. *Attrill*, 921.

SALES.

I. WHAT CONSTITUTES DELIVERY.

A recital in a contract of sale or exchange that the vendor "hereby delivers possession" of the articles sold vests the title and right of possession in the vendee, but is not of itself a delivery of actual possession. *Marsh* v. *McPherson*, 641.

II. ACCEPTANCE OF REPAIRS IN REDUCTION OF DAMAGES.

If the vendee, even after suit brought by him, accepted the articles sold after the time when they should have been delivered, or permitted repairs or supplies to be furnished, and accepted the benefit of them, such fact may be proved in reduction of damages for the breach of contract. *Id.*

III. MEASURE OF DAMAGES FOR BREACH.

1. In case of a total failure of the vendor to comply with a contract of sale, or a partial failure arising from his supplying defective articles, the measure of damages, unless in exceptional cases of special damage, is what it would cost the vendee to supply the deficiency, without regard to the contract price. *Id.*

2. In case of a violation of a contract to sell on a certain credit, the measure of damages is interest for the period of the credit. *Warren* v. *Stoddart*, 657.

SHIPPING COMMISSIONER.

FEES OF.

The exemption allowed by section 4513 of the Revised Statutes of the United States from the fee of two dollars allowed the shipping commissioner for services in shipping crews, extends to a reshipment on all voyages succeeding in regular order the one for which fees are paid, and is not limited to the one next succeeding. *Young* v. *Steamship Co.*, 273.

STATUTES.

I. CONSTRUCTION OF.

1. Under a statute which authorizes a municipality to pledge its aid to a railroad "by loan or donation, with or without conditions," a resolution of a city voting aid on condition that if any of its citizens should subscribe and pay for any stock of the railroad, the latter should deliver to such persons the bonds of the city to that amount, * * * and that its citizens should have the right to subscribe to its stock for a certain time, is a loan or donation within the meaning of the statute. *Taylor* v. *Ypsilanti*, 326; *New Buffalo* v. *Iron Co.*, 353.

2. Whether a seeming act of the Legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury. *Bank* v. *Ottawa*, 866.

3. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision. *Id.*

4. An act of the Legislature of a State which has been held by its highest court not to be a statute of that State, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence between different parties, to be a law of the State, although referred to in later statutes of the State as an existing law, and assumed to be such in earlier cases in the State court, in which its validity was not, and by the settled practice of that court could not be, controverted. *Id.*

5. The act of the General Assembly of Illinois of February 18, 1857, purporting to authorize the issue of certain municipal bonds, is of no force or effect, by reason of its not appearing by the legislative journals to have been passed as required by the Constitution of 1848. *Id.*

6. Under the statute of Illinois of February 12, 1849, copies of the original daily journals kept by the clerks of each house of the Legislature, made by persons contracted with or employed for the purpose, in well-bound books furnished by the Secretary of State, and afterwards deposited and kept in his office, are official records, copies of which certified by him are competent evidence. *Id.*

7. The printed journals of either house of a Legislature, published in obedience to law, are competent evidence of its proceedings. *Id.*

II. PUNCTUATION.

Section 49 of chapter 37 of the Revised Statutes of Illinois 1874, p. 332, is to be construed as if there was no comma between the words "to hear and determine motions" and the words "to dissolve injunctions." Punctuation is no part of a statute. *Hammock* v. *Farmers' Loan and Trust Co.*, 613.

III. See *Constitutional Law; Contracts; Corporations; Courts of the United States.*

TAXATION.

See *Claims against Government; Constitutional Law; Contracts; Corporations; National Banks.*

TELEGRAPH COMPANIES.
See *Constitutional Law*.

TERRITORIAL COURTS.
See *Error and Appeal*.

TRUSTS.

I. HOW FAR TRUST ESTATE CHARGEABLE WITH DEBTS INCURRED BY TRUSTEE.

A married woman grants an estate to a trustee upon trust for her sole and separate use, remainder to her children, and appoints her husband agent and co-trustee to manage the estate, providing that the trustee shall not be liable for his acts. The deed gives neither the trustee nor the husband a right to charge the trust estate for the expenses of running it. Parties who furnish supplies to the husband for the estate, alleging that they were used on the estate by the trustee after the husband's death, and that the trustee admitted a liability for them, and that the husband and trustee were both insolvent, and that the trustee would have had the right to charge the same against the estate in his accounts, attempt to enforce an equitable charge therefor against the estate: *Held*, That as neither the husband nor the trustee had the power to charge the estate, the creditors did not have any claim of subrogation, nor any ground of enforcing against the estate the payment of their demand. *Hewitt* v. *Phelps*, 455.

II. PRESUMPTION OF RECONVEYANCE FROM TRUSTEE.

Where a party conveys land to trustees by a deed containing a provision that if a certain event did not happen in a certain time the deed should be void, and the event did not happen, and in fact became impossible, it will be presumed in a suit brought three years after such failure of the trust, in the absence of proof to the contrary, that a reconveyance had been made by the trustees to the grantor, but such presumption is only *prima facie* and not conclusive, and must yield on the production of contrary proof. *Lincoln* v. *French*, 684.

III. See *Costs*.

WAIVER.
See *Insurance*.

WARRANTY.

A New Orleans firm receives from a special treasury agent certain cotton seized under the act of March 12, 1863, and at his request pays certain charges on it. On a subsequent order the firm delivers up the cotton to the claimant of it and collects from him these charges, which are paid under protest. The claimant before obtaining the cotton gives a bond to save harmless the government and the treasury agents on account of the seizure and detention of the cotton and

of any damages they might sustain by reason of such seizure. The claimant sues the firm for the charges so paid and recovers them back. On suit by one of the firm against the treasury agent: *Held*, That as the firm had not notified the agent of the pendency of the suit, nor called him in to defend it, he was not liable unless he could not have successfully defended the suit brought by the claimant, and that the court having given a certificate of probable cause, the bond given by the claimant would have been a perfect protection to the officer, and there could have been no recovery against him. *Flanders* v. *Seelye*, 767.